SUPREME COURT, U.S. 73-1221

FILED

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MICHAEL RODAK, JR.,

Supreme Court of the United States

October Term, 1973

No. A-589

WILLIAM L. HESTER, *et al.*,
Petitioners,

vs.

NORMAN WARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

HARLEY J. MCNEAL
MCNEAL, SCHICK, ARCHIBALD & CARLSON
520 Williamson Building
Cleveland, Ohio 44114
Counsel for Petitioner,
Continental Casualty Co.

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WILLIAM L. HESTER, *et al.*,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

The petitioner herein, Continental Casualty Company, respectfully prays that a writ of certiorari issue to review the final order and opinion of the Supreme Court of the State of Ohio entered on the 14th day of November, 1973 affirming the judgment of the Court of Appeals for the Third Appellate Judicial District of Ohio, County of Allen, Ohio.

OPINIONS BELOW

The opinion (Journal Entry) of the Court of Common Pleas, Allen County, Ohio, overruling the petitioner's Motion for Relief of Sanctions is unreported (A6*).

* "A" references are to the Appendix hereto, which for convenience has been printed under separate cover.

The opinion (Journal Entry) of the Court of Common Pleas, Allen County, Ohio, overruling the petitioner's Motion for Continuance and vacating of the trial date of April 5, 1971 in this case is unreported (A7).

The opinion (Journal Entry) of the Court of Appeals for the Third Appellate Judicial District overruling the Appeal and Motion to Stay the Trial relative to relief of sanctions imposed under Rule 37(B) of the Ohio Rules of Civil Procedure dated April 5, 1971 is unreported (A10).

The entry of the Supreme Court of the State of Ohio denying the petitioner's Petition for Writ of Mandamus is unreported (A12).

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The judgment entry relative to petitioner's Motion for New Trial and for Judgment Notwithstanding the Verdict is unreported (A21).

The opinion (Journal Entry) of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, dated November 8, 1972 incorporating a transcript of the pre-trial hearing of March 17, 1971 with and incorporated into the record instanter is unreported (A23).

The opinion of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is reported in 32 Ohio App. 2d 121 (A25).

The order of the Supreme Court of the State of Ohio dated February 16, 1973 dismissing the appeal of the petitioner herein for the reason that no substantial constitutional question exists is unreported (A37).

The order of the Supreme Court of the State of Ohio overruling the petitioner's Motion for an Order directing the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, to certify its Record dated February 16, 1973 is unreported (A38).

The order of the Supreme Court of the State of Ohio dated March 9, 1973 allowing a rehearing is unreported (A39), as is the letter of the Supreme Court of Ohio dated March 9, 1973 directing that briefs and oral argument be directed solely to the question raised concerning sanctions under Rule 37 of the Ohio Rules of Civil Procedure (A40).

The opinion of the Supreme Court of the State of Ohio affirming the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is reported in 36 Ohio State 2d 38 (A41).

JURISDICTION

Upon the filing of a Motion for Rehearing, the Supreme Court of the State of Ohio allowed a rehearing, as evidenced by the rehearing order dated March 9, 1973 set forth on A39.

By letter of March 9, 1973, set forth on A40, the Supreme Court of the State of Ohio directed that the briefs and argument in this case be directed solely to the question raised concerning sanctions imposed by the Trial Court under authority of Rule 37, Ohio Rules of Civil Procedure.

The opinion and order of the Supreme Court of the State of Ohio dated November 14, 1973 affirming the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is set forth at A41.

The order granting an extension of time within which to file a Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio dated December 12, 1973 is set forth on A50.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Does the imposition of sanctions under Ohio Civil Procedure Rule 37(A), (B) and (D) which prevented the petitioner from introducing evidence on vital issues of agency and scope of employment constitute a final order upon which an appellate court should rule prior to trial to determine if the petitioner is being denied due process of law?

2. Where the respondent had possession of copies of documents and information for approximately 23 months prior to a request to the petitioner to produce such documents and information, along with seven requests for other documents pursuant to Ohio Civil Procedure Rule 34(A) on November 17, 1970, does the offer of the documents in the possession of the petitioner on March 5, 1971, one month before the date set for trial, constitute a willful refusal to comply with a court order to produce such documents on or before February 15, 1971, justifying the court overruling a Motion filed on March 5, 1971 by the petitioner for relief from harsh sanctions imposed upon the petitioner; resulting in the petitioner being prevented from introducing evidence during trial negating employment and scope of employment of the driver (William L. Hester) involved in the collision, when other, more appropriate sanctions could have been imposed upon the

petitioner which would not have denied the petitioner a trial on the merits in accordance with due process of law?

3. Does the imposition of harsh sanctions resulting in an establishment-preclusion order preventing a jury from deciding disputed issues of agency and scope of employment which were central to a determination of the culpability of the petitioner frustrate the major purpose of Ohio Civil Procedure Rule 37, which is to compel discovery, thereby denying the petitioner a trial on the merits, and due process of law; and, depriving the petitioner of property without due process of law?

4. Is the imposition of harsh sanctions preventing the petitioner from introducing evidence negating issues of agency and scope of employment proper when the discovery sought by the respondent involved only the issue of agency?

5. Since both the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, and the Supreme Court of the State of Ohio have stated in Opinions, "no explanation or excuse was offered" by the petitioner to explain a failure to provide documents previously requested by the respondent at a pre-trial hearing on March 17, 1971, whereas the transcript of the hearing (Appendix pp. A58-A72), in the opinion of counsel, sets forth a full explanation of the reasons for failing to produce some of the requested documents, together with the production of the documents in the possession of the petitioner at that time, should not this Court determine whether the explanation dispelled evidence of willful disobedience of a court order and the petitioner should be granted a new trial to afford the petitioner an adjudication of the case on its merits?

6. If the testimony and evidence introduced on behalf of the petitioner, as proferts, proved an independent contractor status existed between the petitioner and the driver (William L. Hester) of the automobile; and, that Hester was not employed at the time of the accident; should not this Court grant the petitioner a new trial, imposing appropriate sanctions upon the petitioner permitting the respondent an opportunity, at the expense of the petitioner, to disprove the testimony and evidence offered as proferts by the petitioner, to afford the petitioner due process of law upon equal terms with the respondent?

CONSTITUTIONAL PROVISIONS, STATUTES AND CIVIL PROCEDURE RULES INVOLVED

The Fifth and Fourteenth Amendments of the Constitution of the United States are involved and, in pertinent part, are set forth hereinbelow, as follows:

> Fifth Amendment, U. S. Constitution:
>
> No person shall . . . be deprived of life, liberty or property, without due process of law; . . .
>
> Fourteenth Amendment, U. S. Constitution:
>
> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Article I, Sections 1, 5 and 16 of the Constitution of Ohio are involved and, in pertinent part, are set forth hereinbelow, as follows:

> § 1. Right to freedom and protection of property.
>
> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and

seeking and obtaining happiness and safety. (See Const. 1802, Art. VIII, §1.)

§ 5. Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (As amended September 3, 1912.)

§ 16. Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Ohio Rules of Civil Procedure, Rule 34(A) and (B) are involved and, in pertinent part, are set forth hereinbelow, as follows:

RULE 34. *Production of documents and things for inspection, copying, testing and entry upon land for inspection and other purposes*

(A) *Scope.* Subject to the scope of discovery provisions of Rule 26(B) any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, (1) to inspect and copy, any designated documents * * * which are in the possession, custody or control of the party upon whom the request is served; * * *.

(B) *Procedure.* The request may, without leave of court, be served * * * after commencement of the action * * * upon any other party * * * after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection * * *.

> The party upon whom the request is served shall serve a written response within a period designated in the request, not less than twenty-eight days after the service thereof * * *. The party submitting the request may move for an order under Rule 37 with respect to any * * * failure to respond to the request or any part thereof, * * *.

Ohio Rules of Civil Procedure, Rule 37(A) (2) is involved and, in pertinent part, is set forth hereinbelow. as follows:

> RULE 37. *Failure to make discovery; sanctions*
>
> (2) *Motion.* * * * if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted * * * or fails to permit inspection as requested, the discovering party may move for an order * * * compelling inspection * * *.

Ohio Rules of Civil Procedure, Rule 37(D) is involved and, in pertinent part, is set forth hereinbelow. as follows:

> (D) *Failure of party to * * * respond to request for inspection.* If a party * * * fails * * * (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court * * * on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b) and (c) of subdivision (B)(2) of this rule. * * *
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(C).

Ohio Rules of Civil Procedure, Rule 37(B)(2) (a), (b) and (c) are involved and, in pertinent part, are set forth hereinbelow, as follows:

* * * * *

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

STATEMENT OF CASE

On September 4, 1968, the petitioner, Continental Casualty Company, was named as a defendant in an Amended Petition filed on behalf of the respondent, Norman Ward, in the Court of Common Pleas, Allen County, Lima, Ohio, Case No. 52759, together with William L. Hester previously named as a defendant in the case.

The respondent, Norman Ward, was a passenger in a motor vehicle involved in a collision with a vehicle operated by William L. Hester, on December 13, 1966 at 1:10 o'clock A.M. near Lima, Ohio; and, sustained serious injuries as a result of the collision.

Norman Ward claims William L. Hester was employed as an agent of Continental Casualty Company; and, was

acting within the scope of his employment at the time the collision occurred (Record pp. 7-9).

On July 11, 1967, counsel for the respondent took the deposition of William L. Hester, as if upon cross-examination. From the testimony of Mr. Hester and from Answers to Interrogatories submitted by Mr. Hester on or about September 23, 1968, the respondent knew Mr. Hester was not licensed to write any business for the petitioner in Ohio; and, had a business card in his possession which read, "William L. Hester, Special Representative, Fort Wayne District Office, Continental Casualty Company, Bankers Building, Suite A 1, Fort Wayne, Indiana" (Record pp. 9-17).

On December 3, 1968, counsel for the respondent obtained the deposition of Mr. Earl W. Mikels, Agent License Supervisor in the Department of Insurance, Indianapolis, Indiana. Mr. Mikels produced a certified copy of an application for an agent's license for William L. Hester to become a licensed agent in Indiana, a letter authorizing James L. McMahan, Branch Manager, Continental Casualty Company, to requisition the appointment of agents, together with a company requisition for William L. Hester to be a licensed agent for Continental Casualty Company. The application for the agent's license and company's requisition for the license were signed by Mr. James L. McMahan, Branch Manager, Continental Casualty Company. Copies of these documents were attached to the deposition secured by counsel for the respondent (Record pp. 49-50).

On or about November 16, 1970, the case was assigned for trial on April 5, 1971.

On November 17, 1970, respondent served a Request for Inspection of Documents (Record pp. 22-24) on petitioner, pursuant to Civil Rule 34(A) of the Ohio Rules

of Civil Procedure. Three of the documents requested and information relative to the business card of William L. Hester had previously been obtained by counsel for the respondent on or about September 23, 1968 and December 3, 1968, as heretofore indicated.

On January 13, 1971, a hearing was had on the respondent's Motion for an Order to Compel Discovery; and, the petitioner was ordered to produce all documents requested on or before February 15, 1971 (Record p. 25).

On February 16, 1971, the respondent filed a Motion to Impose Sanctions and Brief to which was attached a copy of the application for an Agent's License signed by William L. Hester and James McMahan marked as "Exhibit A" (Record pp. 26-32) which was one of the documents requested by the respondent in his Request for Inspection filed on November 17, 1970 (Record pp. 27-29).

On February 22, 1971, the Court found the Motion to Impose Sanctions "to be well taken"; and, ordered "that the matters regarding the issue of agency and scope of employment contained in plaintiff's Amended Petition be and hereby are established for the purpose of this action . . ." (Record p. 25).

On March 5, 1971, petitioner filed a Motion for Rehearing and Memorandum requesting relief from the sanctions imposed, stating the respondent had, through prior discovery procedures, obtained "part of the information" sought; and, that the petitioner was "ready to provide, to the extent that it is capable of doing so, the remaining information requested" by the respondent (Appendix pp. A4-A5 and Record pp. 34-35).

On March 11, 1971, the case was assigned for a pretrial hearing on March 17, 1971.

On March 17, 1971, the petitioner again requested relief from or modification of the sanctions imposed on

February 22, 1971 in the "interest of justice and fairness to all parties, to permit the fact questions of agency and scope of employment to be litigated and go to the jury," because the petitioner had a good faith and legitimate defense which should be asserted (Record p. 47). All of the documents in the possession of the petitioner which had been requested by the respondent on November 17, 1970 were produced, with the exception of those documents the respondent had previously obtained (Appendix pp. A58-A72 and Record pp. 42-60).

At this time, counsel for the respondent was advised Continental Casualty Company had no lists of prospects (Request 8); and, did not have the Agent's Manual requested, together with the other items, if in existence, requested in Item 10; and stated that as to Request 11, the petitioner did not have a "company policy" requiring all agents, employees or representatives to carry liability insurance on automobiles driven in the course of the company's business (Appendix pp. A58-A72 and Record pp. 52-53).

Counsel for the respondent was also advised the petitioner did not have income tax records or W-2 forms, since William L. Hester was not an employee or on salary, but was paid a commission (Appendix pp. A58-A72, Record pp. 58 and 59).

Copies of directives issued by the petitioner were marked AA and BB and filed with the Court indicating the instructions given to local offices relative to the destruction or retention of some of the documents requested by the respondent (Appendix pp. A58-A72, Record pp. 53 and 158-178).

Request 5 asked for a copy of the Agency Agreement between William L. Hester and Continental Casualty Company. A copy of the Agency Agreement was provided

and is printed in the Record (Appendix pp. A58-A72, Record pp. 154-157).

The Agency Agreement (Par. 3) provides it is not to be construed to create the relation of employer and employee; and, that the agent was free to exercise his own judgment as to persons to solicit and the time and place of solicitation (Record p. 154).

The petitioner also stated everything which could be found or could be produced had been produced in response to the Request for Inspection (Appendix pp. A58-A72, Record p. 58).

On March 19, 1971, by a Journal Entry (Appendix pp. A6-A7), the Court stated:

> "The Court, having considered the exhibits tendered by the defendant, Continental Casualty Company, and having heard arguments of counsel, finds said Motion (request for order relieving said defendant-appellant from the sanctions imposed) is not well taken and the same should be overruled."

On March 31, 1971, the petitioner filed a Notice of Appeal and Motion requesting the continuance of the trial set for April 5, 1971. The stay was requested to permit the Court of Appeals to determine if the imposition of the sanctions constituted a final order from which the petitioner should be relieved to guarantee the petitioner due process of law and those constitutional rights given under the laws of Ohio and the United States of America (Appendix pp. A8-A9, Record pp. 62-65).

The Court of Appeals for the Sixth Appellate Judicial District heard the Appeal, resulting in a Mandate being handed down (filed April 5, 1971) by the Court of Appeals for the Third Appellate Judicial District overruling the Appeal and Motion to stay the trial on the grounds that the Orders and Journal Entries filed in the Court of

Common Pleas "are not final appealable orders." Copy of the Mandate is made part of the Appendix (pp. A10-A11).

On April 5, 1971, the Court of Common Pleas overruled the petitioner's Motion for a continuance of the trial.

On April 5, 1971, the petitioner filed a Petition for Writ of Mandamus, an Amended Petition for Writ of Mandamus, a Motion for Temporary Injunction and Affidavit, and a Petition for Writ of Prohibition in the Supreme Court of Ohio, Case No. 71-233, seeking to have the Supreme Court stay the trial until the petitioner could perfect an Appeal to the Supreme Court of Ohio. The pleadings sought to have the Supreme Court of Ohio consider whether the imposition of sanctions and refusal to grant a continuance of the trial of the case by the Court of Common Pleas (1) constituted an abuse of discretion, (2) failure to afford the petitioner due process of law, and (3) whether the Court of Common Pleas had interfered with or abridged the constitutional rights of the petitioner as guaranteed to it under the laws of Ohio and the United States of America.

The Supreme Court of Ohio found the Amended Petition for Writ of Mandamus should not be allowed; and, that the Petition for Writ of Prohibition should be denied. The entries are set forth in the Appendix (pp. A12-A13).

On April 5, 1971, the petitioner presented an Application for Stay of Proceedings pending the filing of a Petition for Writ of Certiorari to the Supreme Court of the State of Ohio to Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States, to review the denial of the Petition for Mandamus by the Supreme Court of Ohio because of an abuse of discretion by the trial court in imposing unreasonable sanctions upon the petitioner denying the petitioner its constitutional right to a trial

by a jury on the issues of agency and scope of employment of Mr. Hester.

The petitioner, on April 5, 1971, by telephone, was informed Honorable Potter Stewart, Associate Justice, denied the Application for Stay of Proceedings.

When the case was called for trial, April 5, 1971, the petitioner renewed its request to have the court remove the sanctions imposed upon the petitioner. The petitioner stated the issues of agency and scope of employment were crucial to the defense of the case. The petitioner offered to reimburse the Court and the respondent for any expense involved, as well as "to be found in contempt for its failure to produce the documents upon order of this Court . . . to be fined, punished or sanctioned in any other way.", if the sanctions imposed by the Court were removed, since the sanctions imposed removed the only defense the petitioner had, thereby constituting an abuse of discretion; and, were manifestly unjust (Record pp. 75-78).

It was also argued the documents requested could not establish whether the defendant, William L. Hester, was engaged in the scope of his employment at the time of the accident. The petitioner stated the imposition of a sanction declaring the defendant, William L. Hester, was acting within the scope of his employment at the time of the automobile accident was an abuse of discretion and manifestly improper and unjust (Record pp. 77-80).

Before any testimony or evidence was introduced, the Court, after the jury had been impaneled and sworn, stated, in advising the jury as to trial procedures, as follows:

> ". . ., But at this time the Court will inform you that the following, as a matter of law, should be accepted by you as true.

[23] Four: That William L. Hester was the agent for the Continental Casualty Company and was acting within the scope of his authority at the time of the automobile collision on December 13, 1966." (Record pp. 81-82).

After the respondent had rested its case in chief (Record p. 84), the petitioner called the defendant, William L. Hester, for cross-examination, to testify as to the facts surrounding the automobile collision (Record p. 85). Thereafter, the petitioner (Record p. 86) again requested the Court to permit the petitioner to introduce evidence to support its case in chief going to the issues of employment and scope of employment.

The Court ruled that any matters related to the agency and scope of employment of William L. Hester would only be permitted, in the absence of the jury, by way of proferts. (Record pp. 86-87).

Counsel for the respondent stated he did not wish to attend or cross-examine as to the proferts of testimony relating to the issues of agency and scope of employment because the "Court's ruling has already established it * * *." (Record 86-88).

Prior to cross-examining the defendant, William L. Hester, and other witnesses on direct examination to prove Mr. Hester was not employed by the petitioner or acting within the scope of his employment at the time of the accident, it was stated the petitioner was still objecting and respectfully urging the imposition of sanctions interfered with the constitutional rights of the petitioner; and, worked an injustice upon the petitioner (Record pp. 89-90).

Thereafter, the defendant, William L. Hester, was called upon cross-examination by the petitioner, together with other witnesses on direct examination (Chester W. Huffman, Judith Thompson, James McMahan and Ronald

G. Lehman) to prove William L. Hester had been discharged on December 5, 1966; and, was no longer employed as an independent contractor to solicit accident and health insurance policies for the petitioner (Record pp. 90-145). The petitioner also offered exhibits as proferts to support the testimony to the effect, William L. Hester had been discharged on December 5, 1966 and was not acting as an agent or within the scope of his employment on December 13, 1966 when the accident occurred (Record pp. 143-145).

A summarization of the testimony and exhibits referred to above is made part of the Appendix (pp. A15-A18).

Thereafter, the petitioner again requested the Court permit it to offer in evidence all of the testimony, together with the exhibits which had been offered as proferts (Record pp. 144-145).

The Court overruled the request and stated the testimony and exhibits could not be "presented to the jury" by reason of the prior sanctions imposed (Record p. 145).

After the Court charged the jury and the jury retired to deliberate, the petitioner stated it was objecting to the refusal of the Court to permit the introduction of testimony and evidence disproving agency and scope of employment. The petitioner stated no evidence had been introduced to support the issues of agency and scope of employment or the instruction of the Court telling the jury it must accept as fact that William L. Hester was the agent of the petitioner and acting within the scope of said agency at the time of the accident, because such instructions "are contrary to the evidence and testimony introduced" as proferts out of the presence of the jury (Appendix pp. A19-A20).

The petitioner stated the testimony and evidence introduced as proferts conclusively proved the defendant,

William L. Hester, was not the agent of the petitioner; and, was not acting within the scope of said agency when the accident occurred.

The petitioner also said that since the Court required the jury to accept the facts of agency and acting within the scope of said agency, as imposed by sanctions, the charge of the Court was contrary to and a denial of the constitutional right of the petitioner to a fair trial by a jury upon these factual issues (Appendix p. A20).

Thereafter, on April 13, 1971, the jury returned a verdict in favor of the plaintiff and against the defendant, William L. Hester, and the petitioner herein in the sum of Three Hundred Fifteen Thousand Dollars ($315,000.00); and, judgment was entered on the verdict, together with the costs of court (Record pp. 69-70).

On May 7, 1971, the petitioner filed a Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment in the Alternative. Among other Assignments of Error, the petitioner urged that the imposition of sanctions going to the merits of the litigation amounted to abuse of discretion which deprived the petitioner of (1) its right to a jury trial upon all of the issues raised by reason of the happening of the accident; (2) due process of law; and (3) equal justice under the Constitutions of the United States and Ohio. Copy of the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment is printed in the Record (pp. 70-72).

On August 23, 1971, the Court, by Judgment Entry, found the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment, "are not well taken" and overruled same (Appendix p. A21).

On January 17, 1972, the petitioner filed an Amended Notice of Appeal in the Court of Common Pleas appeal-

ing the judgment entered by the Court of Common Pleas overruling the Motion for New Trial and Motion for Judgment Notwithstanding the Verdict and Judgment, said Appeal being directed to the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio.

Assignments of Error and a Brief to support the Appeal to the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, were filed on May 4, 1972 in the Court of Appeals, wherein it was urged (Assignment of Error No. 2) the Court abused its discretion and erred in imposing drastic and unjust sanctions upon the petitioner, preventing the petitioner from proving the defendant, William L. Hester, was not an agent of the petitioner, acting within the scope of his employment when the accident occurred. It was claimed the petitioner was deprived of a hearing on the merits, contrary to the Constitutions of the United States and Ohio. The Assignment of Error No. 2 filed in the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, is made part of the Appendix (p. A22).

On October 25, 1972, the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, in affirming the Judgment of the Trial Court, stated the imposition of sanctions upon the petitioner was not a deprivation of the constitutional right of due process, nor of the constitutional right to trial by jury, where the petitioner had an opportunity to apply for a Protective Order and had not timely offered either an explanation or excuse for failure to comply with a discovery order.

The Court of Appeals also held that where the petitioner had failed to produce documents relating primarily to the issue of agency, the Trial Court did not abuse its discretion or impose unjust sanctions upon the petitioner, in taking the issues of agency and scope of employment from the jury. The Opinion of the Court of Appeals of

the Third Appellate Judicial District of Ohio, Allen County, Ohio, is made part of the Appendix (pp. A25-A35).

On December 4, 1972, the petitioner filed a Notice of Appeal to the Supreme Court of the State of Ohio in the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio. In the Notice of Appeal, the petitioner stated the case involved a substantial constitutional question. The Notice of Appeal to the Supreme Court of the State of Ohio is made part of the Appendix (p. A36).

In a Memorandum in Support of Jurisdiction filed in the Supreme Court of the State of Ohio on January 11, 1973, the petitioner urged there had been no willful failure to produce documents which would justify the imposition of the sanctions imposed upon the petitioner by the Trial Court. The petitioner also claimed it had been deprived of a trial on the merits, contrary to the Constitution of the United States and Ohio which guaranteed the petitioner due process of law, equal protection of the laws and a fair and impartial trial by a jury.

On February 16, 1973, the Supreme Court of the State of Ohio dismissed the Appeal of the petitioner for the reason that no substantial constitutional question exists; and, denied a Motion for an Order directing the Court of Appeals to certify its record (Appendix pp. A37-A38).

On February 22, 1973, the petitioner filed a Motion for Rehearing in the Supreme Court of the State of Ohio requesting that the Supreme Court of the State of Ohio consider Rule 37 of the Ohio Rules of Civil Procedure for the purpose of determining "how far a trial court may go insofar as the severity of sanctions imposed [upon the petitioner] is concerned."

On March 9, 1973, the Supreme Court of the State of Ohio, by Order, allowed the Motion for Rehearing. The

Order of the Supreme Court of the State of Ohio appears in the Appendix (p. A39).

On November 14, 1973, the Supreme Court of the State of Ohio affirmed the judgment of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio. The Supreme Court of the State of Ohio stated in its Opinion, 36 Ohio State 2d 38, that a court does not abuse its discretion by ordering a sanction establishing issues sought to be clarified by the production of documents requested [of the petitioner] when the record indicates the failure to comply with an order of the court to produce certain documents is of a willful nature; and, the petitioner, when it finally produced the requested documents, gave no excuse, such as physical disability or the unavailability of all of the requested documents, from which one could conclude the failure was not willful. The Opinion of the Supreme Court of the State of Ohio is made part of the Appendix (pp. A41-A48).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. Under Ohio Law, Is the Order Imposing Drastic Sanctions Upon the Petitioner a "Final Appealable Order" Under Ohio Revised Code, Section 2505.02, Requiring a Court of Appeals and the Supreme Court of the State of Ohio to Determine Whether the Court Abused Its Discretion in Ordering the Sanctions and Deprived the Petitioner of Due Process of Law Prior to Trial on the Issues?

Ohio Revised Code, Section 2505.02, in pertinent part, is as follows:

> "* * * an order affecting a substantial right made in a special proceeding * * * is a final order which may be reviewed, affirmed, modified, or reversed,* * *."

As the Appendix (pp. A8-A9) will show, the petitioner filed a Notice of Appeal in the Court of Common Pleas in Lima, Ohio on March 31, 1971 seeking to appeal the Order of the Court imposing sanctions and the refusal of the Court to continue the case for trial. The basis for the appeal was (1) the belief the imposition of sanctions was a final order, (2) claimed abuse of discretion, (3) failure to afford the petitioner due process of law, and (4) all of petitioner's constitutional rights under the laws of Ohio and the United States to a trial on all the issues in the case.

After a consideration of briefs and argument of counsel, the Court of Appeals for the Third Appellate Judicial District of Ohio overruled the appeal and Motion to Stay the Trial on the grounds that the Orders and Journal Entries filed in the Court of Common Pleas were not "final appealable orders" (Appendix pp. A10-A11).

Thereafter, the petitioner filed a Petition for Writ of Mandamus, an Amended Petition for Writ of Mandamus,

a Motion for Temporary Injunction and Affidavit, and a Petition for Writ of Prohibition in the Supreme Court of Ohio seeking to have the Supreme Court continue the trial of the case in the Court of Common Pleas until the petitioner could perfect an Appeal to the Supreme Court of Ohio. The purpose of the appeal sought to have the Supreme Court of Ohio consider whether the imposition of sanctions was a final order, and together with the refusal to grant a continuance of the trial by the Court of Common Pleas (1) constituted an abuse of discretion, (2) failure to afford the petitioner due process of law, and (3) whether the Court of Common Pleas had interfered with or abridged the constitutional rights of the petitioner guaranteed to it under the laws of Ohio and the United States of America.

Upon consideration, the Supreme Court of Ohio found the Amended Petition for Writ of Mandamus should not be allowed; and, that the Petition for Writ of Prohibition should be denied, as evidenced by the Entries set forth in the Appendix (pp. A12-A13).

The Court of Appeals of the Eighth Judicial District, Cuyahoga County, Ohio, on October 14, 1971, in the case of *Hlavin v. W. E. Plechaty Co.*, 28 Ohio App. 2d 43, 274 N.E.2d 570, held as follows:

> "1. An order awarding expenses and attorney fees, as sanction (Rule 37, Ohio Rules of Civil Procedure) against persons who unjustifiably resist discovery in civil actions, is a final appealable order under R.C. § 2505.02.
>
> * * * * *
>
> "In addition, the appellee raised the question whether the order awarding expenses and attorneys fees is a final appealable order. R. C. 2505.02 permits an appeal from any order affecting a substantial right

made in a special proceeding. The order in this case is such an order and an appeal may be taken from it.

* * * * *

"The method of sanctions adopted by the Rules of Civil Procedure is to require the resisting party to compensate the party seeking discovery for the expenses necessarily incurred as a result of such resistance. However, there is no provision in the rules for punishment of the resisting party, but a compensatory award is apparently thought to be sufficient sanction."

Hlavin v. W. E. Plechaty Co., 28 Ohio App. 2d 43, 274 N.E.2d 570, Paragraph 1 of the Syllabus and pages 44-45.

In view of the conflicting opinions of the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, and the Court of Appeals of the Eighth Judicial District of Ohio, Cuyahoga County, Ohio, the petitioner submits the imposition of drastic sanctions by the Court was a "final appealable order" under authority of Ohio Revised Code, Section 2505.02.

It is believed the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio and the Supreme Court of the State of Ohio should have entertained the appeal sought by the petitioner prior to trial to determine whether the Court had abused its discretion and failed to afford the petitioner due process of law and its constitutional right to a trial on all the issues prior to the start of the trial on April 5, 1971 since the sanction order of March 19, 1971 did affect the substantial rights of the petitioner.

II. Imposition of Harsh Sanctions Denying Petitioner a Trial on Crucial Issues of Agency and Scope of Employment Requires Relief or Imposition of More Appropriate Sanctions to Afford Petitioner Due Process of Law, When All Documents in Possession of Petitioner Requested by Respondent Are Produced Before Date for Trial and Prima Facie Negate Agency and Scope of Employment Asserted by Respondent.

This case presents squarely the issues of the petitioner's right to due process of law and a trial to a jury to obtain a judgment on the merits in order that the petitioner will not be deprived of property without due process of law; and, is afforded equal protection of the law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

The case is worthy of review to determine whether a trial court, under Ohio Civil Rule 37 of the Ohio Rules of Civil Procedure, can arbitrarily impose harsh and drastic sanctions upon the petitioner on February 22, 1971, followed by an offer of production of all of the documents requested by the respondent which were in the possession of the petitioner on March 5, 1971, 30 days prior to the scheduled trial date for the case. Particularly is this true, since the Court was requested, on March 5, 1971, to set a hearing by the petitioner seeking relief or modification of the sanctions which had been imposed upon the petitioner. The Court did not schedule the requested hearing until March 17, 1971, which was 15 days before the scheduled trial date. During the hearing on March 17, 1971, the petitioner produced all of the documents in the possession of the petitioner for inspection by the court and the respondent. A full explanation was made by the petitioner to the Court and the respondent for the failure to make discovery prior to March 5, 1971. The petitioner also

stated certain of the documents which had been requested could not be produced by the petitioner since the petitioner never had possession of said documents; and, some of the documents requested were never in existence (Appendix pp. A58-A72).

The petitioner asserts its conduct, as described, relative to the production of documents requested by the respondent does not constitute a willful refusal to make discovery justifying the sanctions imposed.

It is apparent the Court did not make a careful inspection of the documents produced by the petitioner on March 17, 1971, since the Court entered an Order contained in the Minutes of the Court on March 19, 1971, journalized on March 31, 1971, wherein it is stated the Court, "having considered the exhibits tendered * * * and having heard arguments of counsel, finds that said Motion [for relief or modifications of the sanctions] is not well taken and that same should be overruled."

An examination of the "Agency Contract" (Record pp. 154-157) and the ledger sheets taken from the ledger of the Indianapolis office of Continental Casualty Company (Record p. 184) produced by the petitioner establishes the defendant, William L. Hester, was not an employee of the petitioner, but was an independent contractor. See Paragraph 3 of the "Agency Contract", as well as the conditions set forth in Paragraphs 2, 11 and 13 of said "Agency Contract".

The ledger sheets prove the last business submitted by Mr. Hester was secured on November 28, 1966; and, prove no business was submitted by Mr. Hester after November 28, 1966. The last payment of commission to Mr. Hester was entered on a ledger sheet on December 6, 1966. The ledger sheets were available for the respondent and Court to examine on March 5, 1971, one month before

the trial of this case; and, were discussed during the pre-trial hearing on March 17, 1971 (Record pp. 42-61 and Appendix pp. A15-A18 and A58-A72).

In view of the uncontradicted evidence set out in the "Agency Contract" and the ledger sheets, it is submitted the harsh and unreasonable sanctions which were imposed by the Court precluding the petitioner from introducing any evidence during the trial on the issues of agency and scope of employment should have been relaxed by the Court.

The Court should also have taken into consideration the automobile collision occurred on December 13, 1966 at 1:10 o'clock A.M. in Lima, Ohio; and, that the defendant, William L. Hester, was only licensed to sell accident and health insurance in Indiana and did not have a license authorizing him to solicit any business in Ohio.

The Court should have considered whether compelling the harsh sanctions predetermining agency and scope of employment, in such a factual situation, carried out the objectives of the Ohio Civil Rule 37 in promoting justice and "were just."

It is submitted the Court should have considered other more appropriate sanctions, such as (1) holding the petitioner in contempt of court; (2) continuance of the case, ordering the allowance of attorney fees and expenses to the respondent to secure evidence to disprove the denial of the agency and scope of employment of the defendant, William L. Hester, asserted by the petitioner; (3) the assessment of a fine; and, an order requiring the petitioner to pay all fees and expenses charged by expert and non-expert witnesses who were to be used by the respondent resulting from the continuance of the case for trial.

The preclusion sanctions imposed resulted in a miscarriage of justice, as well as a taking of the property of

the petitioner without due process of law, contrary to the intent and purpose of Ohio Civil Rule 37, of the Ohio Rules of Civil Procedure and the Constitutions of the United States of America and of Ohio.

Mr. Justice Harlan in the Opinion deciding *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers,* 357 U.S. 197, *reversing* 243 F.2d 254, at pages 208-209 thereof, made the following points in connection with the exercise of a District Court's powers under Rule 37(B):

> "*Failure* to Comply with Order." (Italics added.) For purposes of subdivision (b) (2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.
>
> *"The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court . . . |which| . . . establish* that *there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action, without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations."*
>
> *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers,* 357 U.S. 197, *reversing* 243 F.2d 254.

John W. McCormac, in his comments relative to Civil Rule 37 at Sec. 10.59, pp. 275-276, OHIO CIVIL RULES PRACTICE, writes as follows:

* * * * *

"The options that the court has for disobedience of its orders are similar to those previously imposed in Ohio. **It should be remembered that the object of the Civil Rules is to promote justice. A claim should be dismissed or a default judgment be granted only when such action is in the interest of justice and other sanctions are inappropriate or ineffective."** (Emphasis supplied.)

Vol. 11, OHIO JURISPRUDENCE (2d), Constitutional Law, as to portions of Section 701, page 51; Section 716, pages 62-63; Section 720, pages 66-67 sets forth the following:

"Thus, due process of law has been defined as law in its regular form of administration through courts of justice, as "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," and as the right to be heard."

11 OHIO JUR. 2d, Sec. 701, p. 51.

"§ 716. Right to "Day in Court."—Due course of law implies and requires that parties litigant shall each have a day in court. What is really meant by 'day in court' is due process of law. Two things are essential to it: first, lawful notice; second, opportunity to be heard. A party is afforded his 'day in court' when he is afforded reasonable notice and reasonable opportunity to be heard.

11 OHIO JUR. 2d, Sec. 716, pp. 62-63.

"A person deprived of property without an opportunity to be heard is denied due process of law. Due course of law means that such course of law shall be

enacted as will require that he, whose property is about to be taken, shall have notice of the time and place of hearing, of what is sought to be appropriated, and an opportunity to be heard in his own behalf. Any law which seeks to deprive him of his property without such proceedings is in direct opposition to the letter and spirit of the Constitution."

11 OHIO JUR. 2d, Sec. 720, pp. 66-67.

The case of *Ketchikan Cold Storage Company v. State of Alaska*, Alaska, 491 P.2d 143, seems to be in point. The Court held:

"3. Discovery

Establishment-preclusion order which prevents full adjudication of case on its merits should be employed only on clear showing that such a course is required.

* * * * *

When a party refuses to comply with a discovery order, Civil Rule 37(b) provides the court with a flexible list of sanctions. *One of the most severe sanctions is the establishment-preclusion order.* When facts at issue in a controversy are established against one of the parties, he is precluded from introducing testimony to refute the points taken to be established. *Thus, in effect, the party has been denied his right to trial on the merits to the extent that matters of fact have been rendered incontestable. The sanction is especially severe when the establishment-preclusion order goes to an issue which is central to the determination of the case.*

* * * * *

The purpose of the Rule 37 sanctions is to effectuate the discovery process. The discovery rules have replaced common law pleading as the means of clarifying issues prior to trial. This permits the factual and legal issues to be brought into specific focus at an early time. It also may lead to settlement or early

termination of lawsuits. Discovery has been quite successful in achieving these goals, and we must not condone any attempt to avoid the process. *We cannot, however, allow a procedural rule to frustrate the major purpose of Rule 37, and in fact all the rules of civil procedure, which is to ensure that an individual may have a just determination of his case upon the merits.*"

Ketchikan Cold Storage Company v. State of Alaska, Alaska, 491 P.2d 143, Paragraph 3 of the Syllabus and pages 146-147.

III. Is a Trial Court Required to Grant a New Trial and Modify Drastic Sanctions Previously Imposed upon the Petitioner When, During Trial, Testimony and Evidence Tendered as Proferts, Impeaches Previous Testimony and Answers to Interrogatories Given by Defendant, William L. Hester, Proving Defendant Hester Was Discharged by Petitioner Seven (7) Days Before the Automobile Accident Occurred on December 13, 1966 at 1:10 O'Clock A.M. and Never Was an Agent Acting Within Scope of Employment to Prevent Miscarriage of Justice and Denial of Petitioner's Fair Day in Court?

The Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio, and the Supreme Court of the State of Ohio have based an affirmance of the judgment of the Trial Court upholding a verdict in the sum of Three Hundred Fifteen Thousand Dollars ($315,000.00) against the defendant, William L. Hester, and petitioner on the erroneous conclusion that the petitioner failed to offer any explanation or excuse at the pretrial hearing held on March 17, 1971 for the petitioner's failure to make discovery (Court of Appeals opinion, Ap-

pendix pp. A23-A36, and opinion of the Supreme Court of the State of Ohio, Appendix pp. A41-A48).

As indicated, *supra*, pp. 11-13, on March 17, 1971, the petitioner produced all of the documents in the possession of the petitioner previously requested by the respondent for inspection; and, a full explanation was made concerning the documents which were and were not produced (Record pp. 42-61 and 158-178 and Appendix pp. A58-A72).

It is believed sufficient here to point out the testimony and evidence (Agent's Contract—Record pp. 91-92 and 114-117) offered by the petitioner, as proferts, proved the defendant, William L. Hester, was not an agent of the petitioner, but was an independent contractor working whenever he decided he wanted to work.

The petitioner did not control or establish Mr. Hester's hours, days of work or manner in which he performed his work. Mr. Hester used his own automobile, purchased gasoline and paid for whatever repairs were necessary (Record pp. 92-99 and 110 and Appendix pp. A15-A16).

The testimony also proved Mr. Hester was told on December 5, 1966 he could no longer work for the company. The last business turned in by Mr. Hester was on December 2, 1966. On December 5, 1966, the locks on the Fort Wayne office were changed to prevent Mr. Hester's getting into the office (Record pp. 142-143 and Appendix pp. A16-A17).

All of the testimony and evidence offered by the petitioner proved William L. Hester was not an employee; and, that he was not acting within the scope of his employment as an independent contractor for petitioner on December 13, 1966 at 1:10 o'clock A.M. when the automobile accident occurred.

A summary of the testimony and evidence tendered

by the petitioner as proferts is set forth in the Appendix (pp. A15-A18).

The verbatim testimony and exhibits tendered by the petitioner as proferts appear in the Record (pp. 89-145).

The Interrogatories propounded of the defendant, William L. Hester, answers to said Interrogatories appear in the Record (pp. 11-17). A reading of the testimony and evidence tendered by the petitioner, as proferts, will prove the defendant, William L. Hester, did not truthfully answer Interrogatories 2, 12, 14, 16, 25, 26, 27, 28, 29, and 34; and, did not truthfully answer parts of Interrogatory 11.

It is the opinion of the petitioner the Court of Appeals of the Third Appellate Judicial District of Ohio, Allen County, Ohio and the Supreme Court of the State of Ohio should have carefully examined the testimony and evidence tendered as proferts by the petitioner; and, the answers made by Mr. Hester to the Interrogatories asked of him by the respondent in order to determine whether the petitioner was afforded a just determination of its case upon the merits; and, whether the trial of the case resulted in a miscarriage of justice and a denial of due process of law.

The petitioner respectfully submits that in view of the testimony and evidence tendered as proferts, the untruthful answers made by Mr. Hester to the Interrogatories, the full explanation given by the petitioner on March 17, 1971 concerning the production and nonproduction of documents requested, the absence of a refusal to make discovery as evidenced by the petitioner's offer to produce the documents requested on March 5, 1971, the petitioner has been denied a just determination of its case upon the merits and has been deprived of property without due process of law.

It is respectfully submitted the petitioner is entitled to a reversal of the judgment and a new trial; with appropriate sanctions to be imposed upon the petitioner to allow the respondent every opportunity to secure evidence to disprove the denial of the agency and scope of employment of the defendant, William L. Hester, as asserted by the petitioner.

The reversal of the judgment and the ordering of a new trial in this case is consistent with decisions heretofore handed down by this Court, in order that justice be done between man and man; and, the petitioner is given its right to a trial, on the issues of agency and scope of employment which are central to a fair and just determination of this case.

In the case of *Gill v. Stolow*, 240 F.2d 669, where the trial court ordered a default and heard the case as to damages, refusing to reopen the case to permit testimony and evidence to explain the reason for a failure to appear for a deposition, the Circuit Court of Appeals laid down the following as to the *Court's responsibility "to do justice between man and man"*:

> "The basic issue on the appeal therefore is the court's disciplinary action under Fed. Rules Civ. Proc., rule 37(d), which provides, as its final and most drastic sanction, where a party "wilfully fails to appear" for the taking of his deposition after proper notice, for the entry of "a judgment by default against that party." The proper disciplining of a party under circumstances of default is one of those necessary, but troublesome questions which usually must be left to the control of the trial judge in the course of his administration of his court. Reluctant as we are to interfere, **we feel that this is an occasion where, viewed with the hindsight afforded us by a study of the entire record, the penalty assessed is too drastic and the case must be returned to accord defendants**

a trial of the seriously contested issues of fact involved. In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willfull default." (Emphasis supplied.)

Gill v. Stolow, 240 F.2d 669 at page 670.

"The rule (Fed. Rules Civ. Proc. rule 37(b), 28 U.S.C.A.) is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions. **The court, however, should not go beyond** the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior. B. F. Goodrich Tire Co. v. Lyster, 5 Cir. 1964, 328 F.2d 411; see 4 J. Moore, Federal Practice § 37.03 (1969)."

Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, from pages 860-861.

In WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE the following appears:

"§ 2284. Rule 37.

Any failure to disclose, regardless of the reason for it, brings the sanctions of Rule 37 into play, but the reason **for the failure is an important consideration** in determining what sanction to impose. If the failure is because of inability to comply, rather than because of willfulness, bad faith, or any fault of the party, the **action may not be dismissed,** nor a default judgment given, and less severe sanctions are the most that can be invoked. This merely emphasizes the fact that Rules 37(b) and 37 (d) calls upon the court to **"make such orders in regard to the failure as are just,"** and that justice requires that the most drastic sanctions be reserved for flagrant cases.

Accordingly the courts have administered justice with mercy. They have allowed a party a second

opportunity to comply with the discovery rules and orders made under them [72] and have made other conditional orders intended to encourage compliance

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[72] Second opportunity.

Gill v. Stolow C.A.2d. 1957, 240 F.2d 669.

Gusa v. U. S., D.C.N.Y. 1963, 31 R.R.D. 518.

Demeulenaere v. Rockwell Mfg. Co, D.C.N.Y.1959, 23 F.R.D. 686.

Terry Carpenter, Limited v. Ideal Cement Co., D.C. Neb. 1954, 117 F. Supp. 441.

Socha v. Webber, D.C. Alaska, 1951, 11F.R.D. 124.

Dann v. Compagnie Generale Trans-Atlantique Ltd., D.C. N.Y.1939, 29 F.Supp. 330.

*Armstrong v. Biggs, Ky.*1957, 302 S. W.2d 565, 569, citing *Barron & Holtzoff*.

Frank v. Kempczynski, Del.Super, 1952, 90 A.2d 480, 8 Terry 251.

See *Glaser, Pretrial Discovery and the Adversary System*, 1968, pp. 155-156.

When plaintiff was prepared at pretrial conference to answer interrogatories previously submitted to plaintiff by defendant and the plaintiff submitted reason for failure to answer interrogatories, complaint should not have been dismissed for failure to submit answers and **plaintiff should have been permitted to answer instanter.** *Robison v. Transamerican Ins. Co.*, C.A. 10th, 1966, 368 F.2d 37.

Even though personal injury plaintiff failed to produce herself for discovery deposition, court would deny harsh sanction of dismissal as sought by defendant and grant defendant's motion for an order requiring plaintiff to present herself for discovery in near future. *Stricker v. Milwaukee Inn, Inc.*, D.C.Wis.1968, 285 F.Supp. 133, 134, citing *Barron & Holtzoff* (Wright ed.).

When court's order had not detailed extent of analysis required of employer in response to interrogatories *and had not stated what penalties might be applied for non-compliance*, and employer's production of 120,000 copies of personnel records perhaps took the time allowed, adjudication on merits was too severe a penalty for want of full compliance, and full compliance was again ordered. *Lodge 743, Int'l Ass'n of Machinists, AFL-CIO v. United Aircraft Corp.*, D.C.Conn.1963, 220 F.Supp. 19, affirmed C.A.2d. 1964, 337 F.2d 5, certiorari denied 85 S.Ct. 883, 380 U.S. 908, 13 L.Ed. 2d 797.

rather than to punish a failure. [73] They have reasoned that since the relevant subdivisions of Rule 37 use the word "may" they have discretion to refrain from imposing sanctions for such reasons and on such conditions as they see fit.

It should not be concluded from the cases cited in connection with the preceding paragraph that the courts never impose sanctions for failure to comply with the discovery rules. They do impose sanctions, and often quite drastic ones, as the discussion of Rule 37(b) and Rule 37(d) will show. **Nevertheless it is true that the imposition of sanctions has been com-**

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[73] Conditional orders

Motion to vacate default judgment that was entered for defendant's failure to answer interrogatories was granted on condition that defendant file certain answers within 30 days, produce certain books and papers and pay into court $750 for fees, costs and expenses of plaintiff's counsel plus an additional $100 if case did not terminate before specified future date. *Hendricks, v. Alcoa S. S. Co.*, D.C. Pa. 1962, 32 F.R.D. 169.

Dismissal of action because of plaintiff's failure to appear for taking of their depositions denied and they would be allowed to be examined in California upon payment of defendants' counsel fees and necessary expenses. *Republic Productions, Inc. v. American Fed'n of Musicians*, D.C.N.Y. 1962, 30 F.R.D. 159.

Dismissal for failure to attend deposition denied and plaintiff ordered to answer written interrogatories. *Dunn v. Pennsylvania R. Co.*, D.C. Ohio 1951, 96 F.Supp. 597.

Dismissal denied and defendant given the alternative of taking plaintiff's deposition at place fixed by the court or advancing sufficient funds to plaintiff to enable him to get to place originally fixed for deposition. *Ross v. True Temper Corp.*, D.C.Ohio 1951, 11 F.R.D. 307.

When it was uncertain as to whether "applications" log ever existed and junior party in patent interference made determined effort to establish whether such log did exist, and if so, how it could be identified or located, junior party's failure to produce "applications" log was not inexcusable and court would not impose sanctions for such failure. *International Business Machs., Corp. v. Sperry Rand Corp.*, D.C.Del.1968, 44 F.R.D. 10.

paratively rare[76] and that the courts have taken so seriously the admonition of the rule they are to impose only such sanctions as are just that they have been accused of overleniency by some commentators. *Yet it seems especially fitting that courts should make the punishment fit the crime and should not impose a drastic sanction that will prevent adjudication of a case on its merits except on the clearest showing that this course is required. As the draftsman of the Federal Rules wrote:*

> *In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of willful default.*

The courts have recognized this and have exercised their discretion in a fashion intended to encourage discovery **rather than simply to punish for failure to make discovery.**

> Sect. 2284—Discretion of Court in Imposing Sanctions, pages 766-772, Chap. 6, Vol. 8 WRIGHT and MILLER, *Federal Practice & Procedure.*

The sanctions of dismissal and of judgment by default are severe sanctions, and appellate judges believe they would be remiss in their duties if they chose only to rubber stamp such orders of lower courts. To be sure, these drastic sanctions are indeed provided for by the Rules, but I am certain that the draftsmen did not propose that they should be used liberally in order to eliminate the actual trial of cases.

---

[76] Comparatively rare

"In practice, the case law shows sparing use of the existing sanctions because they are so drastic. Many judges shrink from applying sanctions at all; such measures do not decide cases on their merits." *Glaser, Pretrial Discovery and the Adversary System*, 1968, pp. 154-155.

I suggest that appellate judges believe that a district judge should approach with hesitation the use by him of dismissal sanctions. Where an alternative, less drastic, sanction would be just as effective it should be utilized. For instance, in United States v. Costello, 16 F.R.D. 428 (SDNY 1954), inasmuch as he believed that a default judgment would deprive Costello of U.S. citizenship without a hearing, the trial judge would not enter judgment for the Government by default even though Costello had refused to answer questions put to him at his pre-trial proceedings. Instead, Costello was declared to be in contempt —and was fined. Our appellate court agreed, 222 F.2d 656 (2 Cir. 1955), cert. denied, 350 U.S. 847, 76 S.Ct. 62, 100 L.Ed. 755 (1955), that the lower court action was proper and just."

An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders by Honorable Sterry R. Waterman, United States Court of Appeals for the Second Circuit, 29 FEDERAL RULES DECISIONS, pages 424-425.

See also.

Hovey v. Elliott, 167 U.S. 409;

Hammond Packing Company v. Arkansas, 212 U.S. 322;

Tot v. United States, 319 U.S. 463;

Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1967), 376 F.2d 118, *certiorari denied* 393 U.S. 815, 859;

U. S. v. Costello (2d Cir. 1955), 222 F.2d 656, *certiorari denied* 350 U.S. 847;

Campbell v. Johnson (D.C.N.Y. 1951), 101 F. Supp. 705.

IV. Is the Imposition of Harsh Sanctions Preventing the Petitioner from Introducing Evidence Negating Issues of Agency and Scope of Employment Proper When the Discovery Sought by the Respondent Involved Only the Issue of Agency?

The petitioner submits the documents the respondent requested be produced were documents which only defined the employment relationship between the defendant, William L. Hester, and the petitioner.

It is significant all of the documents requested existed prior to the happening of the accident of December 13, 1966; and, could not possibly lead to the discovery of facts which would determine the basic issue of scope of employment.

Since none of the documents requested by the respondent involved discovery as to whether the defendant, William L. Hester, was engaged within the scope of his alleged employment, the petitioner submits the Court abused its discretion and denied the petitioner due process of law by imposing the sanction which prevented the petitioner from introducing testimony and evidence proving the defendant, William L. Hester, was not acting within the course and scope of his alleged employment prior to and at the time the accident of December 13, 1966 occurred.

> "No absolutely hard and fast rule can be stated which will furnish the complete answer to the problem whether at a given moment an employee is engaged in his employer's business in the operation of a motor vehicle, so as to fix liability upon the employer because of the employee's action or inaction, but rather the result varies with each state of facts. In general, the question whether an employee-driver was acting within the scope of his employment involves an inquiry into the contract of employment

and the relation of his acts at the time of the accident to the service he actually performed pursuant to his employment."

8 AM. JUR. 2d, *Automobiles and Highway Traffic*, § 617, at page 168.

"1. The relationship of principal and agent or master and servant is distinguished from the relationship of employer and independent contractor by the following test: *Did the employer retain control of, or the right to control, the mode and manner of doing the work contracted for?* If he did, the relationship is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor. (Italics supplied.)

2. The rule of *respondent superior* only arises out of the relationship of superior and subordinate and ceases when that relationship ceases to exist; and the reason of it is to be traced to the power of control and direction, which the superior has a right to exercise, and which, for the safety of others, he is bound to exercise, over the acts of his subordinates. (Paragraph four of the syllabus of *Clark v. Fry*, 8 Ohio St., 358, approved and followed.)

3. Where one employs another to do certain work for him, the mere right reserved by the employer to direct as to the quantity of work to be done, or the condition of the work when completed, is not a right to control the mode or manner of doing the work so as to justify the conclusion that the relationship between the employer and the contractor is either that of principal and agent or master and servant. (Paragraph four of the syllabus in *Hughes v. Railway Co.*, 39 Ohio St., 461, approved and followed.)"

Councell v. Douglas, 163 Ohio St. 292, Paragraphs 1, 2 and 3 of the Syllagus.

"The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control, or the right to control, the mode and manner of doing the work contracted for? If he did, the relation is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor."

Miller v. Metropolitan Life Ins. Co., 134 Ohio St. 289, 16 N.E.2d 447.

CONCLUSION

The petitioner submits the imposition of drastic sanctions which prevented the petitioner from introducing testimony and evidence on two vital issues of agency and scope of employment resulted in a miscarriage of justice and denied the petitioner due process of law, contrary to the Ohio Rules of Civil Procedure and the Constitutions of Ohio and the United States of America.

The testimony, evidence and Exhibits introduced by the petitioner (as proferts) clearly prove the defendant, William L. Hester, was not an agent or acting within the scope of his alleged employment with the petitioner prior to and at the time of the accident.

It is respectfully requested this Court reverse and remand this case for a new trial in order that the petitioner will be afforded its day in court on the merits of the litigation.

Respectfully submitted,

HARLEY J. MCNEAL,
MCNEAL, SCHICK, ACHIBALD & CARLSON,
Attorneys for Petitioner,
Continental Casualty Company.

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Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1973
No. A-589

WILLIAM L. HESTER, *et al.*,
Petitioners,

vs.

NORMAN WARD,
Respondent.

APPENDIX
To Petition for a Writ of Certiorari
To the Supreme Court of the State of Ohio

HARLEY J. MCNEAL
MCNEAL, SCHICK, ARCHIBALD & CARLSON
520 Williamson Building
Cleveland, Ohio 44114
Counsel for Petitioner, Continental Casualty Co.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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APPENDIX

REQUEST FOR INSPECTION UNDER RULE 34

(Filed November 17, 1970)

Case No. 52759

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

NORMAN WARD,
Plaintiff,

vs.

CONTINENTAL CASUALTY COMPANY,
Defendant.

REQUEST FOR INSPECTION UNDER RULE 34

Pursuant to Rule 34 of the Ohio Rules of Civil Procedure, this is a request to produce for inspection and copying the following documents and items, which are in the possession, custody, and control of the Continental Casualty Company. The plaintiff specifies that the inspection and copying be made at 9:00 A.M. on Monday, December 21, 1970 at the offices of Navarre, Rizor, DaPore & Pettit, 205 W. Market Street, Lima, Ohio. (Plaintiff will agree to a reasonable request for change of time and place of examination.)

1. A copy of the Continental Casualty Company's requisition to obtain an insurance license for William L. Hester with the Department of Insurance, State of Indiana. Application believed to have been filed on May 31, 1966 with the Indiana Department of Insur-

ance, and under the signature of James McMahan, Branch Manager at Indianapolis, Indiana.

2. A copy of authorization to the Commissioner of Insurance of the State of Indiana authorizing James McMahan to make requests and cancellations of agent's licenses on behalf of the Continental Casualty Company, believed to have been sent on September 4, 1964 and signed by Robert V. Harvey, Vice President, and H. A. Smoot, Assistant Secretary.

3. A copy of the license to William L. Hester to act as insurance agent for the Continental Casualty Company issued by the State of Ohio on approximately June 28, 1966.

4. A copy of the letters, documents, and/or correspondence requesting cancellation of William L. Hester as insurance agent for Continental Casualty Company.

5. A copy of the employment contract and all other written contracts, agreements, and/or documents entered into by and between Continental Casualty Company and William L. Hester at any time.

6. A copy of all checks, ledgers, journals, income tax forms, payroll records, and/or other documents that relate to the payment of any moneys from Continental Casualty Company to William L. Hester from May, 1966 to date.

7. A business card of William L. Hester, showing him to be a "Special Representative, Fort Wayne District Office, Continental Casualty Company, Bankers Building, Suite A1, Fort Wayne, Indiana."

8. A list of prospects for insurance from the membership of the Adams County Artificial Breeders

Association, with the addresses and other information issued to William L. Hester by Continental Casualty Company in November or December of 1966.

9. A copy of all insurance reports prepared by William L. Hester for Continental Casualty Company during the months of November and December, 1966.

10. A copy of all materials furnished by Continental Casualty Company to William L. Hester, including, but not limited to, agent's manual or written instructions, a list of leads particularly of the Adams Company Breeders Association, sample policies, receipt books, report sheets, letters of introduction, lead cards, and all other items picked up by the Continental Casualty Company from William L. Hester following the accident of December 13, 1966.

11. A copy of the company policy that requires all agents, employees, and/or representatives to carry liability insurance or automobiles driven in the course of the company's business.

Navarre, Rizor, DaPore & Pettit
By /s/ Joseph C. DaPore
Attorney for Plaintiff

MOTION OF DEFENDANT FOR ORDER RELIEVING IT FROM PREVIOUS ORDER IMPOSING CERTAIN SANCTIONS

(Filed March 5, 1971)

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

(Title omitted in printing)

The defendant Continental Casualty Company respectfully moves this Court for a Rehearing and an order relieving it from the former order of this Court dated February 22, 1971 imposing certain Sanctions upon this defendant pursuant to Rule 37(B) of the Ohio Rules of Civil Procedure.

Continental Casualty Company
By /s/ FRANK B. CORY
CORY, BOESEL, LEONARD & WITTER
504 Colonial Building
Lima, Ohio 45801 223 2045
Its Attorney

MEMORANDUM

The foregoing Motion is filed pursuant to Rules 59(A) and 60(B) of the Ohio Rules of Civil Procedure. In support thereof this defendant states that the plaintiff, has, through prior discovery procedures, obtained part of the information which it is seeking in the Request For Inspection previously filed herein under Rule 34 of the Ohio Rules of Civil Procedure, and that this defendant now stands ready to provide, to the extent that it is capable of

doing so, the remaining information requested by the plaintiff herein. The Court will note that it is authorized under both Rules 59(A) and 60(B) to grant such relief in its sound discretion and for good cause shown and for any other reason justifying relief from said former Order. This defendant submits that the issues of agency and course of employment are crucial in this case and that the imposition of the Sanctions contained in this Court's Order of February 22, 1971, is not in keeping with the spirit and intent of the new Ohio rules which are designed to augment the expeditious administration of justice to all parties engaged in litigation. This defendant respectfully submits that the granting of an order relieving this defendant from the Sanctions will not in any manner work a hardship to the plaintiff, nor will it prejudice his ability to prosecute his claim, however, the denial of such an order will work manifest injustice to this defendant. This defendant requests the opportunity to be heard on this motion at a time convenient to the Court and the other parties involved.

/s/ FRANK B. CORY

Attorney for Continental Casualty Company

(Proof of service omitted in printing)

JOURNAL ENTRY OF COURT OF COMMON PLEAS OVERRULING MOTION OF DEFENDANT

(Filed March 19, 1971)

No. 52759

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, ALLEN COUNTY, SS.

NORMAN WARD,
Plaintiff,

VS.

WILLIAM L. HESTER,
CONTINENTAL CASUALTY COMPANY,
Defendants.

JOURNAL ENTRY

This cause came on to be heard upon the defendant Continental Casualty Company's Motion filed March 5, 1971 for an order relieving it from the previous order of this court filed on February 22, 1971 imposing certain sanctions upon the defendant pursuant to Rule 37(B) of the Ohio Rules of Civil Procedure. The court, having considered the exhibits tendered by the defendant Continental Casualty Company and having heard arguments of counsel, finds that said Motion is not well taken and that same should be overruled.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the defendant Continental Casualty Company's Motion, filed March 5, 1971 to relieve it from the previous order of

the court filed February 22, 1971 imposing certain sanctions, is hereby overruled.

/s/ JUDGE ROBERT M. LIGHT

Note: Statements of counsel concerning Motion for Relief of Sanctions appear at page A58, *infra*.

JOURNAL ENTRY OF COURT OF COMMON PLEAS OVERRULING MOTION FOR CONTINUATION

(Filed April 2, 1971)

IN THE COURT OF COMMON PLEAS
OF ALLEN COUNTY, OHIO

(No. 52759—Caption omitted in printing)

Upon consideration the Court finds that the motion of the Continental Casualty Company filed April 2, 1971 for a continuation herein is not well taken and the same is hereby overruled. Exceptions saved to Defendant.

/s/ ROBERT M. LIGHT, *Judge*.

NOTICE OF APPEAL

and

Motion respectfully requesting that the trial of this case in the Court of Common Pleas, set for April 5, 1971, in Lima, Ohio, be stayed and continued to permit the appeal filed herein to be heard and adjudicated to guarantee the rights of the defendant, Continental Casualty Company, to due process of law and those constitutional rights given to said defendant under the laws of Ohio and the United States of America.

(Filed March 31, 1971)

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

(Title omitted in printing)

Now comes the defendant, Continental Casualty Company, and hereby gives Notice of Appeal to the Court of Appeals, Third Appellate Judicial District of Ohio, County of Allen, Ohio, from the Final Order and Minutes of said Court of Common Pleas dated March 19, 1971, a Journal Entry reflecting said Final Order and Minutes of said Court of Common Pleas, County of Allen, Ohio, being journalized on March , 1971, a copy of said Journal Entry having been mailed by counsel for the plaintiff to counsel for the respective parties defendant on March 24, 1971, as certified by counsel for the plaintiff, wherein the Court of Common Pleas overruled the Motion filed by said defendant, Continental Casualty Company, on March 5, 1971, requesting an Order be entered by the Court of Common Pleas, County of Allen, Ohio, relieving said defendant from a previous Order of said Court of Common Pleas

filed on February 22, 1971, whereby said Court of Common Pleas imposed the following sanctions upon said defendant, Continental Casualty Company, pursuant to Rule 37 (B) of the Ohio Rules of Civil Procedure, as follows:

> "The matters regarding issue of agency and scope of employment contained in plaintiff's Amended Petition be and hereby are established for the purpose of this action in accordance with the claim made by the plaintiff.";

* * * * *

JOURNAL ENTRY OF THE COURT OF APPEALS

(Filed April 5, 1971)

No. 1443

IN THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT OF OHIO
ALLEN COUNTY

NORMAN WARD,
Plaintiff-Appellee,

vs.

CONTINENTAL CASUALTY COMPANY, *et al.*,
Defendants-Appellants.

JOURNAL ENTRY

This cause was heard on defendant's Continental Casualty Company Notice of Appeal and Motion to Stay and Continue the Trial of Cause No. 52759, Norman Ward, v. Continental Casualty Company, et al., Court of Common Pleas of Allen County, Ohio, which was set for trial on April 5, 1971 in said Common Pleas Court; after considering the Notice of Appeal and Motion, together with the briefs and oral arguments of counsel representing Norman Ward and Continental Casualty Company, and copies of certain papers filed in Cause No. 52759, the court finds that the order or orders appealed from, namely the order of February 22, 1971, imposing sanctions under Rule 37(B) of the Ohio Rules of Civil Procedure and the order of March 31, 1971, overruling the motion filed by the defendant,

Continental Casualty Company, praying that said defendant be relieved from the order of the Court of Common Pleas, are not final appealable orders.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this court that the Motion of Defendant Continental Casualty Company for a stay and continue in Cause No. 52759 is overruled and Cause No. 1443, Norman Ward v. Continental Casualty Company, et al., Court of Appeals of Allen County, Ohio, is dismissed, sua sponte; said dismissal being ordered as to the Notice of Appeal filed March 8, 1971, and the Notice of Appeal filed March 31, 1971.

IT IS FURTHER ORDERED that the Cause is remanded to the Common Pleas Court of Allen County, Ohio, with costs to be assessed against the defendant, Continental Casualty Company.

ENTRY OF THE SUPREME COURT OF OHIO DENYING PETITION FOR WRIT OF MANDAMUS

(Filed April 5, 1971)

No. 71-233

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS OF ALLEN COUNTY

NORMAN WARD,
Plaintiff-Appellee,

vs.

CONTINENTAL CASUALTY COMPANY, *et al.*,
Defendants-Appellants.

This day this cause came on for hearing on relator's Amended Petition for Writ of Mandamus against respondent to grant a continuance of trial in the case of Norman Ward v. Continental Casualty Company, et al., Case No. 52759, in the Common Pleas Court of Allen County, Ohio for the reasons stated in said Amended Petition. Upon due consideration of said Amended Petition and the facts, the Court finds that said Writ should not be allowed. IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that relator's Amended Petition for Writ of Mandamus be and hereby is denied.

ENTRY OF THE SUPREME COURT OF OHIO DENYING PETITION FOR WRIT OF PROHIBITION

(Filed April 5, 1971)

No. 71-233

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS OF ALLEN COUNTY

NORMAN WARD,
Plaintiff-Appellee,

VS.

CONTINENTAL CASUALTY COMPANY, *et al.*,
Defendants-Appellants.

This day this cause came on for hearing relator's Writ of Prohibition against respondent to stay the trial proceedings in the case of Norman Ward v. Continental Casualty Company, et al., Case No. 52759. Upon due consideration thereof and the facts, the Court finds that said Petition is not well taken and should be denied. IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that relator's Petition for Writ of Prohibition be and hereby is denied.

ORDER OF THE SUPREME COURT OF THE UNITED STATES DENYING APPLICATION FOR STAY OF PROCEEDINGS

(Filed April 5, 1971)

THE SUPREME COURT OF THE UNITED STATES

No. .....

October Term, 19....

CONTINENTAL CASUALTY COMPANY,
Petitioner,

vs.

ROBERT M. LIGHT, JUDGE

and

THE COMMON PLEAS COURT OF ALLEN COUNTY,
Respondents.

Application For Stay denied April 5, 1971 by Honorable Potter Stewart, Associate Justice.

SUMMARIZATION OF TESTIMONY AND EVIDENCE OFFERED AS PROFERTS BY THE PETITIONER TO PROVE THE DEFENDANT, WILLIAM L. HESTER, WAS NOT AN AGENT OF THE PETITIONER, ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT PRIOR TO AND WHEN THE AUTOMOBILE ACCIDENT OCCURRED.

The defendant, William L. Hester, identified the Agency Agreement between Mr. Hester and the petitioner (Record pp. 90-92 and p. 144 and Transcript pp. 560-564 and pp. 648-651). He stated the Agency Agreement (paragraph 3) provided that nothing therein should be construed to create the relationship of employer and employee between Mr. Hester and the petitioner (Record pp. 91-93).

Mr. Hester testified he was not paid any salary; and, never received any 1040 income tax voucher since he was paid commissions only. He did not receive any reports from the petitioner. He was not provided with an automobile by the petitioner. He paid his own gasoline and repair expenses. He made his own decisions as to how many hours he would work or what days he would work. He decided where he would go and whom he would see in order to write policies. Whether he would work early in the morning or late at night, or on any given day would be entirely up to him. He could only write accident and health policies in Indiana; and, was paid commissions on the policies he wrote in Indiana. He never received any letters, cards or information from the head office of Continental Casualty Company in Chicago, Illinois. He never received any checks from the head office of Continental Casualty Company. He was entirely on his own. He could not say whether it was true or untrue December

2, 1966 was the last date he reported he had obtained any applications for accident and health insurance. On December 12, 1966, it was his own decision as to whether he would drive back and forth from Mansfield, Ohio to Fort Wayne, Indiana. He did not write any policies of accident and health insurance on December 12, 1966. It was around 6:00 o'clock P.M. on December 12, 1966 when he last had any conversation with anyone on any business on which he received a commission. He did not conduct any business after 8:00 o'clock P.M. on December 12, 1966. He was not required to carry liability insurance on his automobile by the petitioner. Whether or not he carried liability insurance on his automobile was his own decision (Record pp. 90-113).

Chester W. Huffman, Manager and Supervisor of the Fort Wayne, Indiana office of Continental Casualty Company, testified Mr. Hester had an independent agent's contract as an independent contractor with Continental Casualty Company. Mr. Hester worked his own hours; and, was independent. He was his own boss. He used his own car. Subagents, including Mr. Hester, took care of their own expenses. There was nothing covered by Continental Casualty Company. Mr. Hester worked for himself; and, was paid commissions only. Mr. Huffman furnished leads to Mr. Hester and other subagents for which Mr. Huffman received a ten per cent override on applications for health and accident insurance secured by Mr. Hester and other subagents. Mr. Huffman did not give any instructions or orders to Mr. Hester relative to contacts, working hours, use of automobile or areas to work in at any time. (Record pp. 113-118). Mr. Hester had no relationship with the Fort Wayne, Indiana office on December 12-December 13, 1966 (Record p. 121). On December 5, 1966, Mr. Huffman told Mr. Hester he could

no longer call on any policyholders; and, in addition, Mr. Huffman had the locks changed on the door to the office so Mr. Hester would not be able to get into the office from and after December 5, 1966 (Record p. 142).

Judith Thompson, Secretary in charge of ledgers for the petitioner, testified the ledger sheets indicated the last business developed by Mr. Hester was on November 28, 1966; and, that payment of a commission to Mr. Hester on that business was entered on the ledger on December 6, 1966. There is a ledger entry indicating the last time Mr. Hester received commissions on business was on December 2, 1966. All entries in the ledger indicate all of the business written by Mr. Hester was written prior to December 2, 1966. Mr. Hester still has a debit of $2,692.42 which is owing to Continental Casualty Company on premiums collected, but not turned in. The ledger sheets (cash sheets) are the same ledger sheets which were available to counsel for the respondent on March 5, 1971, and exhibited to counsel for the respondent and Judge Light on March 17, 1971 during the pre-trial hearing (Record pp. 131 and 184, and Record p. 51) (Record pp. 122-131 and Exhibits D1-D24, Record p. 184).

James McMahan, "in branch management" for Continental Casualty Company in Indianapolis, Indiana in 1966, identified the Agency Agreement. Mr. McMahan testified Mr. Hester was not an employee of Continental Casualty Company; and, was not on the payroll of Continental Casualty Company. Mr. Hester was paid a commission only. He did not have any hours; and, the company did not require him to submit any reports. Mr. Hester could work any time he wished. Mr. McMahan knew Mr. Hester's account was in arrears because many policies were never issued on which Mr. Hester had submitted an application. Since Mr. Hester moved after Mr. Huffman terminated

him, Mr. Huffman did not have a chance to get certain supplies given to Mr. Hester returned by Mr. Hester. **When Mr. Hester moved from the State of Indiana, his relationship with Continental Casualty Company had been terminated** (Record pp. 132-137).

Mr. Ronald G. Lehman, Internal Auditor for Continental Casualty Company, testified he talked with Mr. Huffman on December 7, 1966; and, was told Mr. Hester had been terminated. Mr. Lehman was in Fort Wayne, Indiana to investigate Mr. Hester's activities. **Mr. Hester, was terminated on or about December 2, 1966 because of the fraudulent applications which he had submitted.** Mr. Lehman saw Mr. Hester in Mansfield, Ohio on December 21, 1966 and picked up the company kit which consisted of applications, receipts and sales brochures (Record pp. 138-141).

Exhibits to support the testimony were marked, including two exhibits which had been marked during the pretrial hearing on March 17, 1971 (Record pp. 143-145).

OBJECTIONS TO THE CHARGE OF THE COURT BY PETITIONER AFTER ARGUMENT

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

(Title omitted in printing)

Mr. McNeal: The Defendant, Continental Casualty Company, again objects to the refusal of the Court to permit the Defendant, Continental Casualty Company, to introduce testimony and evidence disproving the sanctions imposed upon the Defendant, Continental Casualty Company, by the Court relative to the agency of the Defendant, William L. Hester; and the sanction to the effect that William L. Hester was acting within the scope of his agency insofar as the actions of the Defendant William L. Hester surrounding the accident are concerned.

Defendant further objects to the imposition of the sanctions and the Charge of the Court given to the jury in that there was no evidence introduced to support the sanctions imposed by the Court, or the instruction of the Court that the jury must accept the facts that Hester was the agent of the Defendant, Continental Casualty Company and that Hester was acting within the scope of said agency at the time of the accident because these instructions given to the jury are contrary to the evidence and testimony introduced by the Defendant, Continental Casualty Company as proferts out of the presence of the jury as the record in this case will reveal.

The Defendant further objects to the Charge of the Court on agency and scope of agency because the profert testimony and testimony and evidence sought to be introduced before the jury conclusively proves the Defendant,

William L. Hester was not the agent of the Defendant Continental Casualty Company and was not acting within the scope of said agency.

Finally, the Defendant objects to the Charge of the Court to the jury, whereby the Court Required the jury to accept the facts of agency and acting within the scope of his agency, as to William L. Hester as imposed by the sanctions, all of which are contrary to the profert testimony and evidence and contrary to the constitutional rights of the Defendant, Continental Casualty Company to a fair trial and a trial by a jury upon all of the factual issues which should have been brought before the jury, but which were eliminated by the sanctions imposed by the Court prior to the trial on the issues of this case.

Mr. Dapore: The plaintiff opposes the motion made by the Defendant on the basis that Continental Casualty Company had ample opportunity to produce all of the evidence requested as to agency and scope of employment; that they willfully violated the Court's order to so produce that information and that the only reason that the Court denied the right to introduce such evidence was because of misconduct of the Party-Defendant, Continental Casualty Company.

JUDGMENT ENTRY OF COMMON PLEAS COURT ON MOTION FOR NEW TRIAL AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(Entered August 23, 1971)

No. 52759

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, ALLEN COUNTY, SS.

NORMAN WARD,
Plaintiff,

VS.

WILLIAM L. HESTER,
CONTINENTAL CASUALTY COMPANY,
Defendants.

JUDGMENT ENTRY

On this, the 23rd day of August, 1971, this matter came on to be heard upon defendant's motion filed May 7, 1971, as supplemented on May 20, 1971, plaintiff and defendant Continental Casualty Company present by counsel. After argument of counsel, the matter was taken under advisement by the Court. Upon due consideration thereof, the Court finds said motion for a new trial and motion for judgment notwithstanding the verdict and judgment are not well taken and the same should be overruled.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendant's motions for a new trial and for judgment notwithstanding the verdict and judgment be and hereby are overruled.

/s/ JUDGE ROBERT M. LIGHT

IN THE COURT OF APPEALS OF
ALLEN COUNTY, OHIO

(Case No. 1-72-2)

(Title omitted in printing)

ASSIGNMENTS OF ERROR OF DEFENDANT-APPELLANT IN THE COURT OF APPEALS

* * * * *

2. The Court abused its discretion and erred in imposing drastic and unjust sanctions upon the defendant-appellant, Continental Casualty Company, under authority of Civil Rule 37 (B) (2) (a) and (2) (b), preventing said defendant-appellant from proving the defendant, William L. Hester, was not an agent of the Continental Casualty Company, acting within the scope of his employment when a motor vehicular accident occurred, thereby depriving said defendant-appellant of a hearing on the merits of its cause, contrary to the Constitutions of the United States and Ohio. (Fifth and Fourteenth Amendments of the Constitution of the United States and Constitution of Ohio, Article I, Sections 1, 5 and 16)

JOURNAL ENTRY OF THE COURT OF APPEALS OF ALLEN COUNTY, OHIO

(Filed November 8, 1972)

No. 1-72-2

IN THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT OF OHIO
ALLEN COUNTY

NORMAN WARD,
Appellee,

vs.

WILLIAM HESTER, *et al.*,

and

CONTINENTAL CASUALTY COMPANY,
Appellant.

JOURNAL ENTRY

This cause came on to be heard on the Motion of the appellant for permission to incorporate into the record before this Court a transcript of the pretrial hearing of March 17, 1971, and the Court finds that same was inadvertently omitted from the record by reason of oversight of the court stenographer and it is now ordered that same be filed with and incorporated into the record instanter.

This cause further came to be heard on the merits of the appeal and the Court finds no error prejudicial to the appellant in any of the particulars assigned and argued.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment of the Common Pleas Court of Allen County, Ohio, is affirmed at the costs of the appellant and this cause is remanded for execution.

Exceptions saved.

/s/ RAYMOND A. YOUNGER, *Judge*
/s/ J. THOMAS GUERNSEY, *Judge*
/s/ JOHN W. POTTER, *Judge*

(POTTER, J., of the Sixth Appellate Judicial District, sitting by designation in the Third Appellate Judicial District.)

OPINION OF THE COURT OF APPEALS OF ALLEN COUNTY, OHIO

(Decided October 25, 1972)

No. 1-72-2

IN THE COURT OF APPEALS
THIRD JUDICIAL DISTRICT OF OHIO
ALLEN COUNTY

NORMAN WARD,
Appellee,

vs.

WILLIAM HESTER, *et al.*,

and

CONTINENTAL CASUALTY COMPANY,
Appellant.

[Cite as Ward v. Hester (1972), 32 Ohio App. 2d 121.]

Evidence—Discovery—Civ. R. 37—Failure to comply with order—Sanctions—Constitutionality—Due process—Burden of proof—Presumption of order's validity—Appeal—Order not set aside, when—No abuse of discretion—Negligence—Respondeat superior—Proof necessary.

1. The imposition of sanctions under the provisions of Civil Rule 37(B)(2)(a) and (b), where the party against whom the sanctions are imposed has had the opportunity to apply for a protective order and to be heard either on the other party's motion for an order com-

pelling discovery or on the motion to impose sanctions, and has not timely offered either explanation or excuse for failure to comply with a discovery order, is neither the deprivation of the constitutional right of due process nor the deprivation of the constitutional right to trial by jury.

2. The burden is on the party failing to comply with the order for discovery to explain his failure.

3. A sanction order made by a court of general jurisdiction which eliminates from the trial of the action and takes from the jury certain of the issues to which the documents sought in the discovery order relate will be given the usual presumption of validity, including a presumption that the failure to comply has been due to willfulness, bad faith, or fault of the failing party and not to that party's inability to comply.

4. Such an order will not be set aside on review unless it affirmatively appears in the record that the court making the order has abused its discretion and the order is not just. A record which is silent as to any explanation or excuse offered to the trial court by the offending party prior to the time that sanctions are imposed does not show an abuse of discretion or that the sanction order is not just.

5. In determining the principal issue of *respondeat superior* any proof of the subordinate issue of agency is pertinent to and relates to the subordinate issue of scope of employment. Where a party has failed to produce documents relating primarily to the subordinate issue of agency a court does not abuse its discretion or make an order which is not just in imposing sanctions eliminating from the case both of such subordinate issues.

APPEAL: Court of Appeals for Allen County.

Messrs. Cory, Boesel, Leonard & Witter and *Messrs. McNeal, Schick, Archibald & Carlson*, for appellant.

Messrs. Navarre, Rizor & DaPore, for appellee.

GUERNSEY, J. The action from which this appeal is taken originated in the Common Pleas Court of Allen County on June 13, 1967, as an action for damages for plaintiff's personal injuries alleged to have been caused by the negligence of defendant Hester while operating his car in Allen County at about 1:10 a. m. on December 13, 1966.

On September 4, 1968, an amended petition was filed making as party defendants, Continental Casualty Company, which we shall hereafter refer to as the company, and alleging that at all times involved Hester was the agent of the company acting within the scope of his authority. Issues were joined on this amended petition and on or about November 16, 1970, the case was assigned for trial to commence on Monday, April 5, 1971.

On November 17, 1970, acting pursuant to Civil Rule 34, the plaintiff filed and served on the company a request that it produce on December 21, 1970, for inspection and copying, some eleven described documents or groups of documents alleged to be in its possession.

The company having made no response to the request, the plaintiff, acting under Civil Rules 34 and 37, on January 8, 1971, filed and served on the company a motion for an order directed to the company to compel inspection of the documents. This motion was heard by the trial court on January 13, 1971, and on January 25, 1971, it entered its order that the company "produce all documents requested by the plaintiff on or about the 15th day of February, 1971."

The company not having complied with the order of January 25, 1971, on February 16, 1971, the plaintiff filed and served on the company a motion to impose sanctions on the company under Civil Rule 37(B)(2)(a) and (b) for its failure to comply with the court's order compelling discovery, asking that an order be made that all matters regarding the issue of agency and scope of employment be taken as established or that an order be made refusing to allow the company to oppose plaintiff's claim of agency and scope of employment and prohibiting it from introducing evidence pertaining to such matters. This motion was heard by the trial court on February 22, 1971, the company appearing by counsel and by lay representative and the plaintiff appearing by counsel. On the same date the court entered its order finding that the company "has failed to comply with the former order of this court" and ordering that "the matters regarding the issue of agency and scope of employment contained in plaintiff's amended petition be and hereby are established for the purpose of this action in accordance with the claim made by the plaintiff."

On March 5, 1971, the company filed a motion for a rehearing and for an order relieving it from the sanctions imposed in the court's order of February 22nd. In an accompanying memorandum the company asserted that through prior discovery procedures plaintiff had obtained part of the information which he sought in his request for inspection and that the company "now stands ready to provide, to the extent that it is capable of doing so, the remaining information requested by the plaintiff herein." This motion was overruled by the trial court on March 31, 1971. Meanwhile, the company attempted an appeal from the order imposing sanctions which was dismissed as not being from an appealable order, and sought other relief in the higher courts without avail.

The trial of the action commenced as scheduled on April 5, 1971, the court would not permit the company to defend on the issues of whether Hester was an agent of the company acting within the scope of his employment at the time of the collision resulting in plaintiff's injury. The jury returned a substantial verdict in favor of plaintiff upon which judgment was entered. The company now appeals from that judgment assigning as error:

> "1. The court erred in permitting a motion picture made of the plaintiff-appellee characterized as "A Day in the Life of Norman Ward" to be shown to the jury, together with allowing the plaintiff-appellee to describe his activities in the film as it was shown to the jury.
>
> "2. The court abused its discretion and erred in imposing drastic and unjust sanctions upon the defendant-appellant, Continental Casualty Company, under authority of Civil Rule 37(B)(2)(a) and (2)(b), preventing said defendant-appellant from proving the defendant, William L. Hester, was not an agent of the Continental Casualty Company, acting within the scope of his employment when a motor vehicular accident occurred, thereby depriving said defendant-appellant of a hearing on the merits of its cause, contrary to the constitutions of the United States and Ohio."

The gravamen of appellant's argument of its first assignment of error is that since testimony was fully adduced as to the character and scope of plaintiff's injuries the use of the motion picture served only to emphasize and to re-enact for the jury in a cumulative manner all of the testimony previously given, and thus served only to excite and arouse the passions and prejudices of the jury.

None of appellant company's arguments under this assignment of error are directed to or bear in any manner on the issue of liability but relate only to the character and scope of plaintiff's injuries, specifically to the issue of damages. As there is no claim or showing by appellant that the verdict was excessive we fail to see, if the admission of the moving picture and the comment thereon were error, how the appellant was prejudiced. We hold that it was not.

Proceeding then to the second assignment of error we note the following relevant provisions of Civil Rule 37:

> "(B) Failure to comply with order.
>
> "* * *.
>
> "(2) If any party * * * fails to obey an order to provide or permit discovery * * * the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> "(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> "(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> "* * *."

It will be observed that the trial court's sanction order came within the literal terms of the quoted rule. The company's argument, however, is that by not being heard by

a jury on the issues of agency and scope of employment it was denied its day in court, deprived of its property without due process of law, and deprived of its right to trial by jury. It also argues that the sanctions contemplated by Rule 37 must be just, that courts should make the punishment fit the crime and should not impose a drastic sanction that will prevent adjudication of a case on its merits except on the clearest showing that this course is required, and that an appellate court would be remiss in its duties if it chose only to rubber stamp sanctions such as here imposed. Finally, it argues that the documents sought through the discovery process related only to the issue of agency and not to the issue of scope of employment and that if it could be determined that the trial court could impose the sanction of eliminating the issue of agency it still could not properly impose a sanction eliminating the issue of scope of employment.

The leading case dealing with sanctions under Rule 37 of the Federal Rules of Civil Procedure, and by analogy under the similar provisions of Civil Rule 37, is *Societe Internationale Pour Participations Industrielles v. Rogers, Attorney General,* 357 U. S. 197, 78 S. Ct. 1087, involving the dismissal with prejudice of a complaint in a civil action as to a plaintiff that had failed to comply with a pretrial production order. The United States Supreme Court held that it would be a denial of due process for a court to dismiss a complaint because of petitioner's noncompliance with a discovery order *when it has been established that failure to comply has been due to inability* and not to willfulness, bad faith, or any fault of petitioner. The Supreme Court cited the earlier cases of *Hovey v. Elliott,* 167 U. S. 409, 17 S. Ct. 841, and *Hammond Packing Co. v. State of Arkansas,* 212 U. S. 322, 29 S. Ct. 370, and determined by way of *obiter dictum* and implication that dismissal, where the failure to comply has been due to willfulness, bad faith,

or any fault of the person whose compliance was required, would not be a denial of due process. Sanction orders are long established in our jurisprudence and there seems to be no sound reason that we can fathom to determine that an order made for any of these latter reasons, and not made in the face of proof of inability to comply, should be unconstitutional in any of the respects asserted by defendant company. Discovery, as well as being a means of reducing the difficulties of obtaining evidence, is part of the process of narrowing the issues for trial, with full protection given to the party against whom discovery is sought to have his day in court by applying for a protective order under Rule 26(C), or in resisting a motion for an order compelling discovery under Rule 37(A), or in resisting the imposition of sanctions under Rule 37(B). If the party against whom discovery is sought has not sought a protective order, has not brought forth proper reasons for the denial of an order compelling discovery, or has not shown proper reasons why sanctions should not be imposed he has effectively waived his right to assert the issues which the court's sanctions deprive him from asserting and he has not been deprived of any further constitutional due process or right of trial by jury any more than he would have been so deprived had he failed to file an answer to the plaintiff's complaint, or in some other manner had failed to join issue.

The burden is on the party failing to comply with an order for discovery to explain his failure. 27 Corpus Juris Secundum 271, Discovery, Section 86. On appeal the burden is upon the appellant to affirmatively show the intervention of error which has been prejudicial to the appellant's rights. In similar reference judgments and orders of courts of general jurisdiction are presumed to have validity unless the record reveals to the contrary. The record before us shows that the trial court had a hearing

on January 13, 1971, resulting in the order of January 25, 1971, compelling discovery. Likewise a hearing was held on February 22, 1971, on the motion to impose sanctions, which resulted in the order of the same date imposing sanctions. The record does not show whether counsel for the company appeared at the former of these hearings but it shows that counsel for the company did appear at the latter hearing. For some reason unknown to this court the company has not chosen to include in our record a transcript of either the hearing of January 13, 1971, or the hearing of February 22, 1971. If any explanation or excuse for not supplying the documents sought by plaintiff was offered at either of these hearings such explanation or excuse is not before us. If it is necessary, as some of the cases seem to hold and as appears by way of *obiter dictum* in *Societe Internationale Pour Participations Industrielles v. Rogers, Attorney General, supra,* that before a sanction of dismissal or a sanction eliminating crucial issues be imposed, it must be shown that the failure to comply with a discovery order has been due to willfulness, bad faith, or fault of the person whose compliance is required, we may presume from the court's orders that such showing was made by the plaintiff and that the company failed to offer any explanation or excuse at either of these hearings to counter such presumption.

The company has tendered to the court a transcript of a so-called pretrial conference or hearing held on March 17, 1971, which was inadvertently omitted from the record filed in this court by oversight of the court stenographer. Among other things before the trial court at such time was a motion for rehearing of the sanction order. Although solely because of the oversight of the stenographer we have now ordered this transcript to be filed as a part of the record of this appeal we are of the opinion that whatever it contains is matter ex post facto in relationship to the issue

of the propriety of the sanctions. Moreover, examination of the transcript shows again that no explanation or excuse was offered by the company at that time for its previous failure to comply with the discovery order. It was then and is now claimed that the fact that the plaintiff had obtained some of the documents from other sources absolves the company from any requirement for furnishing same. Such might have been the case had the company made such claim at an earlier hearing but it does not appear that the company did so. Neither does it appear that the plaintiff was able to obtain the documents at a time which would give the plaintiff adequate time to prepare his case. A party should not be absolved from a duty of turning over documents for inspection by forcing an opposing party to use his resources to obtain the same documents from others.

We conclude that the appellant company has failed to show that the trial court lacked authority to impose sanctions. The appellant then contends that the documents sought to be inspected by the plaintiff related only to the issue of agency and not to the issue of scope of employment and that the trial court exceeded its authority in imposing a sanction as to the latter even though it might have imposed a sanction as to the former.

We find in Rule 37(B) nothing limiting the scope of sanctions solely to the issue to which the matter to be discovered relates. Subdivisions 2(a), 2(b) and 2(c) thereof provide, in each case, for sanctions beyond such issues including the ultimate sanctions of dismissal of the action or default judgment. Moreover, although agency might be determined as a fact without any determination of scope of employment the reverse is not usually true, as scope of employment depends largely on the fact and character of the agency.

The ultimate issue is neither agency or scope of employment but the issue of *respondeat superior, i. e.*, whether the master is required to answer for the act of the servant. In order to obligate a master to respond in damages for the negligence of a servant it is necessary not only that the servant be acting within the scope of his employment but the master must have the power to control and direct the conduct of the servant. *Rogers v. Allis-Chalmers Mfg. Co.*, 153 Ohio St. 513, 526. In *Tarlecka v. Morgan*, 125 Ohio St. 319, 324, Chief Justice Marshall said:

> "* * * 'Scope of the employment' has never been accurately defined, although many attempts have been made. It cannot be accurately defined, because it is a question of fact and each case is *sui generis*. The act of an agent is the act of the principal within the course of the employment when the act can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered, or a natural, direct, and logical result of it. * * *"

Very simply, the issue of *respondeat superior* is determined by deciding whether the employee was acting as his master's agent in performing the act which produced the injury. We must conclude that the issues of agency and scope of employment, if separate issues at all, are so intertwined that documents which tend to prove the former necessarily tend to prove the latter and that sanctions purporting to eliminate both of these issues from the trial of a cause are well within the scope of the sanctions specifically permitted by Civil Rule 37(B)(2)(a) and (b). Being specifically permitted by the rule they must be presumed to be just and that the trial court did not abuse its discretion in the absence of a showing to the contrary.

Having found no error prejudicial to the appellant company the judgment of the trial court must be affirmed.

Judgment affirmed.

YOUNGER, *P. J.*, and POTTER, *J.*, concur.

POTTER, *J.*, of the Sixth Appellate District, sitting by designation in the Third Appellate District.

NOTICE OF APPEAL TO THE SUPREME COURT

(Filed in Court of Appeals December 4, 1972)

IN THE COURT OF APPEALS OF
ALLEN COUNTY, OHIO

(Title omitted in printing)

Now comes the appellant, Continental Casualty Company, and gives notice of appeal to the Supreme Court of Ohio from the judgment entered in the Court of Appeals of Allen County, Third Appellate District of Ohio, on the eighth day of November, 1972; that the case is one which did not originate in the Court of Appeals; and, the case involves a substantial constitutional question.

MCNEAL, SCHICK, ARCHIBALD & CARLSON
HARLEY J. MCNEAL, *of Counsel*
520 Williamson Building
Cleveland, Ohio 44114 621-9870
Attorneys for the Appellant, Continental Casualty Company

ORDER OF THE SUPREME COURT OF OHIO DENYING APPEAL AS OF RIGHT

(Entered February 16, 1973)

No. 73-11

IN THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

NORMAN WARD,
Appellee,

vs.

WILLIAM L. HESTER *et al.;*
CONTINENTAL CASUALTY CO.,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR ALLEN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Allen County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Allen County for entry.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY RECORD

(Entered February 16, 1973)

No. 73-11

IN THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

NORMAN WARD,
Appellee,

vs.

WILLIAM L. HESTER *et al.*;
CONTINENTAL CASUALTY CO.,
Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR ALLEN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO ALLOWING REHEARING

(Entered March 9, 1973)

No. 73-11

IN THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

NORMAN WARD,
Appellee,

vs.

WILLIAM L. HESTER *et al.;*
CONTINENTAL CASUALTY CO.,
Appellant.

REHEARING

It is ordered by the court that rehearing in this case is allowed.

LETTER OF THE SUPREME COURT OF OHIO RE LIMITATION OF BRIEFS AND ORAL ARGUMENT

(Dated March 9, 1973)

THE SUPREME COURT OF OHIO
Columbus

March 9, 1973

Mr. Harley J. McNeal
Attorney at Law
520 Williamson Building
Cleveland, Ohio 44114

Mr. Joseph C. DaPore
Attorney at Law
205 West Market Street
Lima, Ohio 45801

Re: Case No. 73-11, Ward v. Hester

Gentlemen:

As you know the motion for rehearing in the above captioned case was allowed, and upon reconsideration the motion to certify the record has been allowed.

I have been directed by the Court to inform you that the briefs on the merits in this case and oral argument are to be directed solely to the question raised concerning the sanctions under Rule 37.

Very truly yours,

/s/ THOMAS L. STARTZMAN

OPINION OF THE SUPREME COURT OF OHIO

(Decided November 14, 1973)

No. 73-11

IN THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

NORMAN WARD,
Appellee,

vs.

WILLIAM L. HESTER *et al.*;
CONTINENTAL CASUALTY CO.,
Appellant.

[Cite as Ward v. Hester (1973), 36 Ohio St. 2d 38.]

Court procedure—Evidence—Discovery—Failure to comply with order—Sanctions—Severity—Discretion of trial court—Where noncompliance wilfull—Civ. R. 37 (B)—Negligence.

Where, in discovery proceedings, a litigant fails to comply with an order of the court to produce certain documents, and the record indicates that the failure is of a willful nature, the court does not abuse its discretion by ordering, as a sanction pursuant to Civ. R. 37(B), that the matters regarding which the discovery order was made, and the issues sought to be clarified by the production of the documents requested shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

APPEAL from the Court of Appeals for Allen County.

This is a personal injury case wherein a sanction was imposed, pursuant to Civ. R. 37, for failure to produce documents. The plaintiff instituted an action in the Common Pleas Court to recover damages for injuries suffered as a result of an automobile accident near Lima. Shortly thereafter, the complaint was amended to include Continental Casualty Company as a defendant because of information provided by Hester, one of the individual defendants, that he was working as an insurance agent for Continental.

On November 17, 1970, plaintiff served a request for inspection of documents upon Continental, pursuant to Civ. R. 34(A). The documents sought were related to the *existence*, if any, and the *nature* of the relationship between Hester and Continental.

Continental failed to respond to the request, and on January 13, 1971, a hearing was held before the Common Pleas Court upon the plaintiff's motion for an order to compel discovery. The court ordered Continental to produce all documents previously requested by the plaintiff on or before February 15, 1971. Continental failed to heed the court order. On February 16, 1971, the plaintiff filed a motion to impose sanctions upon Continental for failing to comply with the court's order compelling discovery. Plaintiff also moved the court for an order, under Civ. R. 37(B), "that all matter regarding the issue of agency and scope of employment be taken as established for the purpose of this action in accordance with the claim made by the plaintiff." The motion to impose sanctions was heard on February 22, 1971, with counsel for both sides present. The court was informed that the documents and information requested by the plaintiff had not been furnished by Continental. Whereupon, the court granted plaintiff's motion to impose sanctions and made the following order:

"It is therefore ordered, adjudged and decreed that the matters regarding the issue of agency and scope of employment contained in plaintiff's amended petition be and hereby are established for the purpose of this action in accordance with the claim made by the plaintiff."

Continental filed, on March 5, 1971, a motion for rehearing, which was denied by the court after arguments were presented by both counsel. Continental appealed the sanction order to the Court of Appeals, which refused to rule on the merits of the order because there was no final appealable order. The trial commenced, as scheduled, on April 5, 1971; and, pursuant to its order, the court would not allow Continental to defend on the issue of whether Hester was an agent of the company acting within the scope of his employment when the accident occurred. The jury returned a verdict for $315,000, and judgment was entered upon the verdict. The Court of Appeals affirmed that judgment, and the cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Navarre, Rizor & DaPore and *Mr. Joseph C. DaPore*, for appellee.

Messrs. McNeal, Schick, Archibald & Carlson and *Mr. Harley J. McNeal*, for appellant.

WILLIAM B. BROWN, *J.* The question presented in this case is whether the imposition of sanctions, as provided by Civ. R. 37, preventing the defendant Continental from introducing evidence regarding agency and scope of employment at trial, was within the court's discretion.

This case involves the construction of Civ. R. 37(B), effective July 1, 1970, which, in pertinent part, provides:

"(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of that court.

"(2) If any party or an officer * * * fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

"(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

"(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

"(e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in subsections (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

> "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Subsections (a) through (e) list the sanctions or combinations of sanctions available against a party that fails to obey the court's order. The plaintiff herein satisfied the condition precedent to seeking the sanction, *i. e.*, he obtained a court order compelling discovery pursuant to 37(A). When Continental chose to disregard the court's order, he sought one of the alternate sanctions provided for failure to obey the order in Civ. R. 37(B)(2)(b)—refusal to allow evidence to be introduced upon a specific issue.

The subject matter of the sanction was related to the issues involved in the documents sought by discovery. The documents sought dealt with the relationship between Hester and Continental. Even though those documents related only to the issue of *agency*, the issue of *scope of employment* is sufficiently akin that the court's establishment of these two issues at trial was appropriate. The court thereby ruled specifically according to the provisions of Civ. R. 37(B)(2)(b).

Continental does not contend that the sanction imposed by the court was unauthorized by the rule. Rather, it claims that, under the circumstances, the specific sanction imposed was too harsh, and that another less severe sanction should have been imposed such as assessment of expenses. Continental contends that, absent a showing that its failure to produce was willful, the court abused its discretion by not first using a less severe sanction.

This section of the rule, which authorizes the imposition of sanctions, has not been construed by this court. However, F. R. C. P. 37(b), which deals with sanctions, is virtually identical to the Ohio rule. This section has been construed in *Societe Internationale Pour Participations Industrieles et Commerciales v. Rogers* (1958), 357 U. S. 197. There, a Swiss holding company sued the United States Attorney General under the Trading with the Enemy Act for the return of property seized during World War II. When the company refused to produce records sought by the government on the basis that the production would violate Swiss penal laws and that an order prohibiting the production had been made by the Swiss federal attorney, the district court imposed a F. R. C. P. 37 sanction, dismissing the complaint with prejudice. The Supreme Court, at page 212 in its opinion, held that the imposition of a sanction, of such harsh consequences as the dismissal of the suit, could not be justified "* * * when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." The court felt that the company's ready production of over 190,000 records and the threat of the penal order hanging like the sword of Damocles over its head were indications that the failure was not due to bad faith or willfulness.

The Supreme Court, in that case, concluded, first, that a sanction, of the degree of severity as dismissal, could not be justified when the failure was the result of the party's inability and not willfulness or bad faith. It should be noted that the sanction in the instant case was of a lesser degree of severity than a dismissal. Secondly, the court's conclusion was based upon a comparative rule summarized in 4A Moore's Federal Practice, 37-56, paragraph 37.03 [2.1], as:

> "* * * the *Rogers* court laid particular emphasis upon the level of contumacy as a determinant of the harshness of the sanction. It stated unequivocally that no wilfulness is necessary to bring to bring Rule 37(b) into play. But it added that wilfulness is a necessary ingredient in a decision to dismiss the case for failure to produce. * * *"

The record in the instant case does not indicate that Continental's failure to comply was due to inability. Rather, the record indicates willfulness and bad faith on the part of Continental.

The request for production of documents was filed on November 17, 1970. The record does not indicate any response by Continental until March 5, 1971, three and one-half months later, when it filed a petition for rehearing. This was only one month before the date set for the commencement of the trial. There is no record of any response to plaintiff's request for discovery, of the court's order to compel discovery, or of plaintiff's motion to impose sanctions. Nor does the record contain a request for an extension of time, a motion for protective orders, or any of the other procedures provided in the Civil Rules to avoid disclosure. Even when Continental finally responded, it gave no excuse, such as physical disability or the unavailability of all the requested documents, from which one could conclude the failure was not willful.

This behavior of Continental would seem to indicate the failure to produce was willful and done in bad faith. In such a case the contumacy of Continental reached the level that could justify a severe sanction. We hold, accordingly, that under the circumstances the trial court did not abuse its discretion in choosing to impose the sanction of the establishment of agency and scope of employment at trial.

Continental's activity here is akin to that in *Bollard v. Volkswagen of America* (W. D. Missouri, 1971), 56 F. R. D. 569, 584, where the court, in entering a default judgment against defendant on the issue of liability, said:

> "In the case at bar, the failure to make timely discovery was intentional. Without objecting or seeking protective orders or extensions of time, defendent VWoA sought to have discovery completed only on its own time schedule and totally frustrated with respect to certain crucial items. This finally impeded trial on the merits and made it impossible to discern the merits of the defenses and for plaintiff to support her complaint with proof of certain issues."

Appellate courts have reversed the imposition of severe sanctions, such as dismissal or default judgment, in cases where the record indicated that the failure to produce was not due to "willfulness, bad faith, or any fault of petitioner." In *Gill v. Stolow* (C. A. 2, 1957), 240 F. 2d 669, 672, the court concluded "that the record, however belatedly, did show bona fide ill health and a real attempt to comply with the court's order thereafter." Where a review of the entire record in *Dorsey v. Academy Moving & Storage* (C. A. 5, 1970), 423 F. 2d 858, indicated that the failure to supply information was neither willful nor done in bad faith, but was due to a combination of illness and an airline strike, the court did not uphold the imposition of the sanction. The record in the instant case evidences no such mitigating circumstances.

Judgment affirmed.

O'NEILL, *C. J.*, HERBERT, CORRIGAN, STERN, CELEBREZZE and P. BROWN, *JJ.*, concur.

ORDER OF THE SUPREME COURT OF OHIO AFFIRMING JUDGMENT OF THE COURT OF APPEALS

(Entered November 14, 1973)

No. 73-11

IN THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

NORMAN WARD,
Appellee,

vs.

WILLIAM L. HESTER *et al.*;
CONTINENTAL CASUALTY CO.,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR ALLEN COUNTY

This cause, here on appeal from the Court of Appeals for Allen County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Allen County for entry.

ORDER OF THE SUPREME COURT OF THE UNITED STATES EXTENDING TIME

(Dated December 12, 1973)

SUPREME COURT OF THE UNITED STATES

No. A-589

WILLIAM L. HESTER, *et al.*,
Petitioners,

v.

NORMAN WARD.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1974.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States

RULE 34

Rule 34. Production of documents and things for inspection, copying, testing and entry upon land for inspection and other purposes

(A) Scope. Subject to the scope of discovery provisions of Rule 26(B) any party may serve on any other party a request to produce and permit the party making the request, or someone acting on his behalf, (1) to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which intelligence can be perceived, with or without the use of detection devices) which are in the possession, custody or control of the party upon whom the request is served; (2) to inspect and copy, test, or sample any tangible things which are in the possession, custody or control of the party upon whom the request is served; (3) to enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(B) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within a period designated in the request, not less than twenty-eight days after the service thereof or within such shorter or longer time as the court may allow. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless it is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

RULE 37

FAILURE TO MAKE DISCOVERY: SANCTIONS

(A) Motion for order compelling discovery.

Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:

(1) *Appropriate court.* A motion for an order to a party or a deponent shall be made to the court in which the action is pending.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move

for an order compelling an answer or an order compelling inspection in accordance with the request. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(B) Failure to comply with order.

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of that court.

(2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in subsections (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(C) Expenses on failure to admit.

If a party, after being served with a request for admission under Rule 36, fails to admit the genuineness of any documents or the truth of any matter as requested, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Unless the request had been held objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made.

(D) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection sub-

mitted under Rule 34, after proper service of the request, the court in which the action is pending on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(C).

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF OHIO

ARTICLE I, SECTIONS 1, 5 and 16

§ 1. Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety. (See Const. 1802, Art. VIII, §1.)

§ 5. Trial by jury; reform in civil jury system.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury. (As amended September 3, 1912.)

§ 16. Redress in courts.

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

PROCEEDINGS OF MARCH 17, 1971—SECOND PRE-TRIAL HEARING RE PETITIONER'S MOTION FOR RELIEF OF SANCTIONS

[1] The Court: This is Case No. 52759, Norman Ward versus Continental Casualty Company, et al. coming on for hearing on a second pre-trial, having the actual trial date upon the merits of this case assigned for hearing the fifth day of April, 1971. Present are Mr. Chester M. Cable, Jr. on behalf of the defendant Tramell; Joseph C. DaPore on behalf of the plaintiff; Mr. Frank B. Cory and Mr. Harley J. McNeal, co-counsel on behalf of the Continental Casualty Company; and representing Continental Casualty Company also is Mr. William Kimer.

We have before us the motion of the defendant Continental Casualty Company for an order relieving from a former order of the Court of February 22, 1971, in which the Court imposed certain sanctions relative to the agency of defendant Hester as an employee and in the scope of employment of Continental Casualty Company. And also before us is an appeal filed by Continental Casualty Company March 8, 1971 from the imposition of said sanctions.

* * * * *

[6] The Court: So much for the moment for those issues. I think it would be well for us to proceed upon your position or arguments with reference to your motion filed on March 5, 1971, Mr. Cory, on behalf of the Continental Casualty Company for a rehearing on an order relieving the former order of the Court. What is the position of the Continental Casualty Company?

Mr. Cory: Do you want this part of it put in the record before we review the documents?

The Court: Just to say generally what your position is and look at the documents and call the [7] court reporter back in after we have looked at the documents.

Mr. Cory: We will proceed any way.

The Court: Just a general statement or two.

Mr. Cory: In order to comply with the Court then, by way of a general statement and for that purpose only, let the record show that Mr. McNeal and I are here this afternoon on our motion for rehearing filed herein pursuant to Rules 59 and 60 of the Ohio Rules of Civil Procedure asking that the Court modify the former order of the Court dated February 22, 1971 wherein the Court imposed certain sanctions relative to the questions or issues of the agency of William Hester and the issue of whether or not he was, at the time of the accident involved herein, acting within the scope and course of his employment with Continental Casualty Company as alleged in the amended petition. The modification we are requesting being that in the interest of manifest justice and in interest to fairness of all parties and in the spirit and intent of the Ohio Rules of Civil Procedure, they being recently adopted and to my knowledge this phase having never been tested before, that the Court modify its former order and remove the sanctions and permit the questions of agency and scope and course of employment to be litigated in this case to go to the jury in this case, they being questions [8] of fact which we submit are jury questions, which we further submit we have a good faith and legitimate defense to and which we feel in the interest of fairness we should be able to assert in this case.

Now I do not want to limit myself by those remarks, but if I understand what the Court is looking for, that is a general statement.

Mr. DaPore: May I object to the hearing of evidence or production of testimony on this phase?

The Court: You may be heard.

Mr. DaPore: I want to interpose an objection, to preserve the record, that I do object to the taking of any testimony or production of any documents, that this matter has been decided by the Court and it would be improper to reconsider it at this time.

The Court: Are we somewhat in the position of going to our basic question of what is fair play between the parties as a matter of principle and practicality both, in that if the Court understands the position of the parties here at this time, the Court ruled that by reason of the laches and undue delay of the Continental Casualty Company under the rules should have imposed upon them a restraint against asserting information if it takes advantage of the plaintiff herein.

On the other hand, if this question is not too complex **[9]** but still at this late hour, two weeks before trial, be a disadvantage or unfair imposition by the Continental Casualty Company upon the plaintiff herein. And at this point if Continental Casualty Company displays the documents, it is still for the Court to resolve whether or not, having at least taken a look to some extent at the documents and the extent of the inquiry involved herein, in order to rule upon the motion. So I believe the Court will, having that in mind, note Mr. DaPore's objection at this time and ask that we proceed in order that the Court can more fairly evaluate its ruling of February 22, 1971.

(Whereupon a recess was taken by the Court.)

The Court: At this time then, Mr. Cory, having reference to the request for inspection under Rule 34 filed by plaintiff herein in this Court on November 17, 1970, are you now prepared to proceed with the eleven items requested therein?

Mr. Cory: In response to the Court's inquiry, the record may show that the defendant Continental Casualty Company is prepared to offer to plaintiff's counsel in response to the request for inspection previously filed under Rule 34," certain documents which will be reviewed on the record at this time.

These documents having been furnished to counsel for the said defendant Continental Casualty Company by this company, [10] and constituting to the best of our knowledge all of the documentary information that is in the possession of that company; And that fact can and will be further substantiated by a written affidavit filed herein forthwith demonstrating what has been produced at this time constitutes all that is available to be produced in response to this question or request.

For the record, we will state that in response to Request Number One asking for a copy of Continental Casualty Company's requisition to obtain an insurance license for William L. Hester, this is and has not been furnished to counsel for Continental Casualty Company by that defendant; however, we submit for the record that this information is now and has been in the possession of plaintiff's counsel by virtue of a certain deposition previously taken herein on December 3, 1968 of a certain E. W. Makels, an official with the Department of Insurance with the State of Indiana, taken in Indianapolis on that date.

We submit that the information requested in Number One has been and is in the possession of counsel for the plaintiff; And we would make the same statement for the record as to the request contained in Paragraph Number Two of the Request for Admissions.

As to Number Three, the record may show that counsel for the defendant Continental Casualty Company has not been [11] supplied with a copy of any license for William L. Hester; but we submit for the record that such a license

was in fact referred to and discussed by William L. Hester by answers to interrogatories propounded to him by plaintiff's counsel on or about September 23, 1968; and in response to Interrogatory Number Six therein, was identified as being license number 57462; And we submit that this apparently is and has been in the possession of plaintiff's counsel and defendant Continental Casualty Company would not, therefore, have it anyway.

In response to Request Number Four, I am handing herewith to Mr. DaPore a certain document pertaining to the cancellation of William L. Hester, dated February 22, 1967, which to the best of our knowledge is the only documentary possession or in the possession of Continental Casualty Company. That was in response to Request Number Four.

The Court: In lieu of marking these documents as exhibits the Court, by agreement of the parties, will ask that they be marked to the effect that as the documents are produced respectively, they will refer to the paragraph in the November 17, 1970 Request for Inspection under Rule 34, so that each document would then on its face or on the back thereof, be marked, quote, Response to Plaintiff's Request Number, and then a number, close your quotes, which would refer to the paragraph accordingly.

(Whereupon Response to Plaintiff's Request Number Four **[12]** was marked for identification.)

The Court: Continue, Mr. Cory.

Mr. Cory: The record may show that that which has been furnished as a Response to Plaintiff's Request Number Four is all that is in the possession of Continental Casualty Company pertaining to this particular request.

I now hand to Mr. DaPore, and will ask the reporter to mark, Response to Plaintiff's Request Number Five, a complete copy of the quote agency contract end quote, between William L. Hester and Continental Casualty

Company which we submit is entirely responsive to Request Number Five and constitutes all the documentary material in the possession of the defendant Continental Casualty Company.

(Whereupon Response to Plaintiff's Request Number Five was marked for the purposes of identification.)

Mr. Cory: Let the record show that I have handed to the court reporter a myriad of documents which taken in combination and individually are responsive to Request Number Six and Nine heretofore filed by plaintiff, and we would ask that they be placed in separate envelopes and marked in that manner, the volume and content thereof being too great to go through them and mark them individually.

(Whereupon Response to Plaintiff's Request Numbers Six and Nine were marked for the purposes of identification.)

[13] Mr. DaPore: The Court's attention is particularly called to the dates of December 13th, which was the date of the accident involved, and in the case of William Hester, did have a correspondence in the journals of Continental Casualty Company listing the name of policy holder Walter Hildebrand at a premium of $82.90, commission of $29.02; and producer was to this Hester.

And on the same date, December 13th, there was policy holder by the name of William Wensel, policy number 31558170 at a premium of $12.80, commission of $8.32, with the producer being Hester.

The Court: Now are those as of December 16, 1966?

Mr. DaPore: December the 13th.

The Court: Is that the date of the accident?

Mr. DaPore: Yes.

The Court: So on the date of the accident then, you have two policies of insurance sold for which Hester is getting credit?

Mr. McNeal: That is subject to explanation.

The Court: Yes. The record should show that that Court inquiry was directed to the plaintiff rather than defendant.

[14] Mr. Cory: I think the record should show in response to Mr. DaPore's comments, as Mr. McNeal has pointed out, the information Mr. DaPore has put in the record is contained in the documents given to him; however, it is subject to explanation and subject to testimony and certainly, as we have continued to urge this Court, goes only to the question of fact whether or not Mr. Hester was an agent of the company and does not concern itself as to whether or not at the time of this accident he was acting in the course and scope of his employment, which we continue to assert are questions of fact for the jury to decide.

Now continuing further for the record, we respectfully submit that Request Number Seven concerns itself with the business card of William Hester and we submit that that is in the possession of Mr. Hester and not the defendant, Continental Casualty Company and was again referred to by Mr. Hester in his answers to interrogatories dated herein on September 23, 1968.

Further, for the record, we point out that under the terms and conditions of the agency contract submitted in response to Request Number Five, the defendant Continental Casualty Company would not have in its possession these business cards.

In response to Request Number Eight, the record may indicate that the defendant Continental Casualty Company has **[15]** no such list of prospects referred to therein.

We have previously disposed of Request Number Nine.

As to Request Number Ten, we respectfully submit that again under the terms of the agency contract, these documents and materials are not required to be retained by the defendant Continental Casualty Company and if

they exist, they are in fact of the defendant William L. Hester, and not this defendant.

And finally as to Request Number Eleven, we again refer to the terms and conditions of the agency contract and submit that no such policy is required and is therefore not in the possession of this defendant and cannot therefore be furnished at this time.

And in addition, we would respectfully offer to this Court in explanation of the situation that this defendant has found itself in in complying with the request for inspection furnished under Rule 34, a copy of the policy of Continental Casualty Company concerning retention and/or destruction of documents which we ask to be filed with the other information which we offer herein, and which we feel does go to the merits of our request for reconsideration and rehearing and order removing the sanctions previously imposed by this Court.

The record may show that documents marked Defendant Continental Casualty Exhibits "AA" and "BB" are offered herewith to assist the Court in better understanding the reasons for the delay involved in complying with the order of [16] the Court in compelling inspection of the documents requested in the motion filed pursuant to Rule 34, and are offered herewith for that purpose.

The record may further show in conclusion, that with the review of the materials requested by the plaintiff in its request for inspection under Rule 34, that considering the documents offered in response thereto identified in the record, that the defendant Continental Casualty Company has complied to the extent that it is able to do so with the request for inspection; and that by doing so, plaintiff has not and will not be prejudiced by an order of this Court removing the sanctions previously imposed.

The Court: Nothing further from defendant Continental Casualty Company on behalf of the motion to file for reconsideration of imposition of sanctions?

Mr. Cory: No.

Mr. DaPore: We pose an objection to the whole matter. We preserve our objections to this whole matter.

* * * * *

The Court: The Court would inquire of the plaintiff as to, for the record, what difference it would now make to the plaintiff as to whether you had these [17] documents supplied to you as requested by the Court in December of last year or January of this year, as distinguished from today?

Mr. DaPore: It has totally disrupted our preparation for the trial of this case in an orderly manner or fashion. There are numerous matters on the eve of trial that need to have consideration, the taking of additional depositions to verify it and so forth. We feel that at this time it is improper to say that they cannot now produce most of the items which were requested. This should have been done in response back before December 17, 1970 and we could have planned on it at that time.

We also feel that there are other materials that the Continental Casualty Company does have or reasonably should have that they haven't produced; that they have intentionally interfered with the plaintiff in proper presentation of this issue of agency, and the material that they have produced actually supports that issue of it.

We feel we would be substantially harmed by any modification of the sanctions in this case.

The Court: Now you have represented that had you had this information as early as three or four months ago, you would have taken depositions to clarify these

matters. Specifically can you give the Court any depositions that you would have had to take?

[18] Mr. DaPore: Certainly. The employer of the immediate supervisor of William Hester is a fellow by the name of McMahn, and we feel that with this information we would need to take his deposition. We feel that the depositions should be taken of all these policy holders that are listed in close proximity of the dates that are related and whether or not he was representing himself to them as a salesman and whether or not they got a contract back from Continental Casualty Company. And it would be a multitude of work involved in checking out this material that we were prepared to do six months or five months before the trial, which we cannot do now.

And we have exerted all of our funds and efforts in preparation of this and the plaintiff is destitute and has no more funds to continue the fight on agency. It would be very harmful for the plaintiff to be required to go back and re-establish this, as the Court has already granted it.

The Court: Is there any other specific investigation or preparation which plaintiff would have been enabled to do with more time which they would now be unable to do at this late date of Court trial? If so, explain to the Court specifically.

Mr. DaPore: Just other than the fact we are totally helpless at this point to prove the issue of agency by April the fifth any more than the information we [19] already have obtained up to this date.

The Court: Is there any answer given by the Continental Casualty Company in nature of not having such a document prevented you from taking other steps to complete the evidence or find the evidence that you needed to prove that point?

Mr. DaPore: Yes.

The Court: What, for example?

Mr. DaPore: (No answer.)

The Court: Do you understand the question? In other words, you now know that you cannot get this information because Continental Casualty Company, as a representative, say we don't have this information now, as they have said in one of these explanations.

Mr. DaPore: I really don't know what is in all this material. For example, I don't see any cancelled checks, ledgers, journals or income tax forms. Whether they have them or don't have them, when they threw them away, whether they threw them away intentionally to avoid this; all of this information I would now have to seek out. There is other means, for example, of obtaining income tax forms. There is other very expensive means of obtaining cancelled checks through Continental Casualty Company banks. You know, going into their photocopies and so forth. Whether we would want to do this I don't know. I have just very briefly **[20]** seen this information for the very first time and I am sure that there are other things that we may have been able to do had we had this in sufficient time to do them. There may not. It may be that some of these things were intentionally destroyed by Continental Casualty Company or may not have been.

The Court: You are saying it's problematical.

Mr. DaPore: We are to the standstill where they have, by their failure to comply with this Court's order, shutting our request of good faith discovery and completely devoid the plaintiff's ability to prove by a preponderance of the evidence the issue of agency.

The Court: And scope?

Mr. DaPore: And scope of employment, yes.

The Court: Mr. Cory, do you wish to say something?

Mr. Cory: In response to comments from plaintiff's counsel, in addressing to the timeliness of all of this, I think the record should be made clear the very earliest date by virtue of the procedural requirements of the new Ohio Rules, that counsel could have obtained information that he seeks and has now, we submit, been given, would have been and by record in this case, is February 16, 1971. The Court will recall that the motion to request [21] inspection was filed in January—I mean in November of 1970. Thereafter, pursuant to several verbal extentions of time, the matter was delayed and postponed with the acquiescence of plaintiff's counsel. Then in January, pursuant to the procedural requirements of the Ohio Rules, plaintiff's counsel filed a motion to compel inspection, which by order of this Court, was granted and the defendant ordered to produce on February 16, 1971—less than seven weeks prior to April the fifth trial date. We submit that if plaintiff's counsel was as concerned as the record demonstrates that he is to obtain this information not knowing until February 16, 1971 whether or not it would be produced, then there is some laches on the other side of this case that could have been developed during the three year pendency of this case. It now boils down to a situation confronting us all on the eve of trial and I think those comments are pertinent as to the timeliness of all of this; And I feel this should be a part of this record.

Mr. DaPore: Let's get the record a little bit straight. The response was due on December 17, 1970 and out of courtesy to Continental Casualty Company and Frank Cory, I extended those dates in hopes that they would produce those, and now I am being criticized for the courtesies I extended. Now Frank Cory says there weren't courtesies. I may have to remind him and I don't think that's what Frank [22] meant. I would have had four

months, approximately, to develop my case on this thing, which at least would have been a good adequate start and we would have known at that time what they had available and what they did not have available, but not at this time. I hate to be criticized for extending the courtesy.

Mr. Cory: I certainly don't mean to be critical, but I felt the comment was pertinent because I knew no more about the response than he did, and as I said at the time of the original hearing, he was gracious enough to extend the time.

Mr. McNeal: If the Court please, I think it should be said in response to Mr. DaPore's question about income tax records, again, referring to the agency contract and the method by which Mr. Hester is involved in the litigation, Continental National American of Continental Casualty Company would have no income tax records. Now also there would be no intentional destruction of any records, as perhaps was indicated.

The Court: Now on the income tax records, don't you have W-2's?

Mr. McNeal: There would be no W-2's. He is not any salary man. He is paid a commission.

Mr. DaPore: There was W-2's, Mr. McNeal. You better check your facts.

[23] Mr. McNeal: There would only be a showing of commissions paid.

Mr. DaPore: No, sir.

Mr. McNeal: And I don't believe a W-2 is used—

The Court: The Court would interrupt. We are not going to get into personalities here. We are going to take one step at a time. Anyway, your explanation was that they did not have an income tax form which would reflect this matter upon the matter of agency?

Mr. McNeal: As requested by Mr. DaPore, and to our knowledge, Continental Casualty Company did not intentionally destroy any records. Everything that has been in the possession of Continental Casualty Company has been produced. There is no intentional destruction of any record which Mr. DaPore indicated in a statement that he did not know whether any of these records which have not been produced were intentionally destroyed or not; and I say for the record that Continental Casualty Company did not intentionally destroy anything. They produced everything they had or could find or could produce in response to the request for inspection.

The Court: Mr. DaPore, did you want to enter any other thought?

Mr. DaPore: About the statement [24] that Mr. McNeal just made with reference to income tax, there was withholdings made according to the attorney that represents Mr. Hester by Continental Casualty Company. Where are those records?

Mr. McNeal: Did you have Mr. Hester produce any kind of record?

Mr. DaPore: No I have not. I have asked Continental Casualty Company to produce those on the representation that was made that they were withheld, and I think your records would show that; and you don't have those records here.

Mr. McNeal: As far as we know, Mr. DaPore, they are not in the possession of Continental Casualty Company and Mr. Hester's attorney has informed you about something that may or may not be true.

Mr. DaPore: Before you give your professional statement to the Court that this does not exist as a matter of fact, I would suggest that you check your facts more thoroughly than you do by making gross statements like this that may prove very embarrassing.

Mr. McNeal: All I can tell you is that Continental Casualty Company has represented to us as their counsel that they have no such records.

If the Court please, in view of Mr. DaPore's statement about desiring to take a deposition of a supervisor, that [25] supervisor, if still living, will be made available at Mr. DaPore's convenience.

Mr. DaPore: I am not interested now.

Mr. McNeal: Further, it may be possible to enter into a stipulation concerning the issuance of policies, whether or not Mr. Hester had any involvement with certain policies on this date, and we are very willing to ascertain that information. If the information shows that he did issue a policy or was involved in any policy, we will enter into a stipulation to that effect.

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[26] The Court: * * * Mr. McNeal also wishes for the record to show that there [27] should be produced at the Continental Casualty Company's request and expense, copies of the documents submitted in response to Plaintiff's requests therefor, in order that all parties will be properly informed and can study and use the same.

Mr. McNeal: That is correct.

The Court: At this time the Court will take this matter under advisement and make a decision very soon and send you minutes.